# DOCKET

No. 86-5309-CSY
Status: GRANTED
CAPITAL CASE

Docketed:
July 28, 1986

Title: Bobby Lynn Ross, Petitioner
v.
Oklahoma

Court: Court of Criminal Appeals
of Oklahoma

Counsel for petitioner: Peterson,Gary

Counsel for respondent: Liddell,Tomilou Gentry

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | May 27 1986 | | Application for extension of time to file petition and order granting same until July 27, 1986 (White, May 28, 1986). |
| 2 | Jul 28 1986 | G | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 4 | Aug 27 1986 | | Brief of respondent Oklahoma in opposition filed. |
| 6 | Sep 4 1986 | | DISTRIBUTED. September 29, 1986 |
| 8 | Oct 3 1986 | | REDISTRIBUTED. October 10, 1986 |
| 9 | May 18 1987 | | REDISTRIBUTED. May 21, 1987 |
| 10 | Jun 8 1987 | | REDISTRIBUTED. June 11, 1987 |
| 12 | Jun 15 1987 | | Petition GRANTED. limited to Question I presented by the petition. |
| | | | ********** |
| 14 | Jun 26 1987 | | Order extending time to file brief of petitioner on the merits until August 24, 1987. |
| 15 | Jul 22 1987 | | Joint appendix filed. |
| 16 | Aug 10 1987 | | Record filed. |
| 17 | Aug 14 1987 | | Record filed. |
| 18 | Aug 24 1987 | | Brief amici curiae of ACLU. et al. filed. |
| 19 | Aug 24 1987 | | Brief of petitioner Bobby L. Ross filed. |
| 20 | Sep 26 1987 | | Brief of respondent Oklahoma filed. |
| 21 | Nov 23 1987 | | SET FOR ARGUMENT. Tuesday, January 19, 1988. (4th case). |
| 22 | Dec 10 1987 | X | Reply brief of petitioner Bobby L. Ross filed. |
| 23 | Dec 15 1987 | | CIRCULATED. |
| 25 | Jan 19 1988 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

86-5309

ORIGINAL

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1986

BOBBY LYNN ROSS,
Petitioner

v.

STATE OF OKLAHOMA,
Respondent

---

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

---

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

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The petitioner, Bobby Lynn Ross, who is now held in the Oklahoma State Penitentiary in McAlester, Oklahoma, asks leave to file the attached Petition for Writ of Certiorari to the Court of Criminal Appeals for the State of Oklahoma without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States.

The petitioner's affidavit is support of this motion is attached hereto.

Respectfully submitted,

Thomas G. Smith, Jr.
P.O. Box 146
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(405) 527-2135

Counsel for Petitioner

86-5309

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## QUESTIONS PRESENTED

I

Did the trial court commit an error involving constitutional standards in a capital case when it refused to excuse for cause a prospective juror who twice stated that he would automatically vote for the death penalty and forced the Petitioner to use a peremptory challenge? Is the Oklahoma Court of Criminal Appeals allowed to treat the error as harmless, in a capital case, in view of the Sixth and Fourteenth Amendment rights to a fair jury and trial, as well as directly conflicting authority in federal and state courts of last resort regarding reversal for the impairment of the peremptory challenge exercise alone? Is there a conflict of authority among the federal circuit courts of appeal regarding the effect of the genuine reduction of peremptory challenges?

II

Did the Oklahoma Court of Criminal Appeals impart an unconstitutionally broad and vague construction on the aggravating circumstance: "Knowingly created the great risk of death to more than one person," when it held that prior verbal threats inside a motel, none clearly attributed to the petitioner and at a time when he wielded no weapon, satisfied as proof because of a later close range shooting of another person, outside the building and with no one else around -- a person the petitioner could not have known would be there?

III

Did the Oklahoma court violate the ex post facto rule of the United States Constitution when it retroactively applied to Mr. Ross' appeal, pending long before it, an amendment eliminating the former mandatory requirement to conduct a comparative proportionality review of Mr. Ross' case to other similar cases and defendants, for purposes of punishment?

## PARTIES TO PROCEEDINGS BELOW

In the Court of Criminal Appeals of Oklahoma, Case No. F-83-780, the Appellant was Bobby Lynn Ross (petitioner in this action). The Appellee was the State of Oklahoma (respondent in this action).

In the District Court of Roger Mills County, Oklahoma, Case No. CRF-83-27, the plaintiff was the State of Oklahoma and the defendant was Bobby Lynn Ross.

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## OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma is published as Ross v. State, 717 P.2d 117 (Okl. Cr. 1986). The Opinion itself is reproduced in its entirety in the Appendix.

There is no formal trial court opinion.

## JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1257(3). The opinion of the Court of Criminal Appeals was entered on April 4, 1986. The Court of Criminal Appeals denied a timely petition for rehearing on April 28, 1986. On May 28, 1986, Mr. Justice White entered an order extending the time for petitioning for certiorari up to and including July 27, 1986. The Petition was mailed on the next working day, July 28, 1986.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. I, section 10 (excerpt):

> "No state shall .... pass any Bill of Attainder, ex post facto law, ...."

U.S. Const., Art. VI (excerpt):

> "The Constitution .... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. Const. Amend. VI (excerpt):

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...."

U.S. Const., Amend. VIII (excerpt):

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. XIV (excerpt):

> "No state shall .... deprive any person of life, liberty, or property, without due process of law ..."

## STATEMENT OF CASE

### Summary

Designations to the trial transcript are (Tr.), and to the original case record, (O.R.).[1] Bobby Lynn Ross was sentenced to death for first degree murder by jury in Roger Mills County. He had previously been granted a change of venue from Beckham County, an adjoining county, because of the pre-trial prejudice and publicity involved over a black man accused of killing a white police officer in Elk City, Oklahoma. Petitioner's trial counsel had also requested that venue not be had in Roger Mills and other close counties because of prejudice and a lack of black Americans available as prospective jurors. (O.R. 207-08).

The jury in the second stage of the bifurcated (See A-16, § 701.10) trial was instructed upon five aggravating circumstances, 21 O.S. 1981 section 701.12(2), (4), (5), (7) and (8) (See A-16, §701.12), and found that all existed. (O.R. 345, 358). Three of the aggravating circumstances, § 701.12(4), (5) and (8), were based mainly upon the fact that the victim had been a police officer, even the "heinous, atrocious or cruel" circumstance.[2] (See Opinion, p. 9).

The petitioner was also accused in the second stage of trial of an unadjudicated charge in Texas, by a convicted alleged accomplice and for whose testimony no evidence in corroboration was presented. (Tr. 1031-43; 1049-52). The trial court refused to limit the State's second stage inquiry of the petitioner, regarding the unadjudicated accusation, which resulted in the petitioner not taking the stand to defend his life. Such inquiry of the petitioner by the State would have been improper in the guilt stage under the Oklahoma evidence code, 12 O.S. 1981, section 2609. At oral argument, held almost a year before the Oklahoma Court of Criminal Appeals' Opinion of April 4, 1986, the

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1. Citations to the Appendix for the Opinion in Ross v. State are designated (Opinion, p. ___). Other citations to the Appendix are (A___).

2. 21 O.S., 1981, § 701.12(4). Note in Eddings v. Oklahoma, 455 U.S. 104, 115, n. 3, 4, 102 S. Ct. 869, 873 (1982), the U.S. Supreme Court criticized the Oklahoma Court for such a finding regarding the fact that the victim was a police officer, and for which there was at Mr. Ross' trial, a separate aggravating circumstance, § 701.12(8).



Assistant Attorney General had conceded this was error. Petitioner's request for transcripton of the oral argument in his Petition for Rehearing, on April 24, 1986, was not granted by the Oklahoma Court.

The petitioner's requested instruction in the second stage regarding the possible mitigation of intoxication (O.R. 322) was refused by the trial court. There was evidence the petitioner had imbibed alcohol and taken drugs that night. In the second stage the trial court instructed the jury that the phrase "heinous, atrocious or cruel" is directed to crimes where death is preceded by torture or serious physical abuse and the State failed to object thereto. The jury found the circumstance despite an obvious lack of torture or serious physical abuse in the record. On appeal both the State and the Oklahoma Court of Criminal Appeals justified the jury finding on the basis that prior "torture or serious physical abuse" was not the law in Oklahoma, despite the unobjected to instruction to the jury. As discussed in detail below, Oklahoma has never found an infirm aggravating circumstance to be harmless error. Such a finding on appeal was a difference in life or death for Mr. Ross.

The above issues have not been raised in the Petition for Writ of Certiorari, but it is from this context the petitioner has raised the trial court's error during voir dire, the appellate court's unconstitutionally broad construction of "knowingly created a great risk of death to more than one person", and the retroactive refusal to conduct a comparative proportionality review.

### Judgment and Sentence of the Trial Court

Bobby Lynn Ross was tried and convicted of murder in the first degree in Roger Mills County District Court. He was sentenced to death upon the recommendation of the jury. The defendant was also convicted of Robbery with Firearms and sentenced to ninety-nine (99) years imprisonment.

The state presented evidence that Mr. Ross, and a co-defendant with a "bulge" in his pocket that he said was a gun,

entered a motel late at night and robbed it with only the night clerk present. The state asserted that the petitioner came face to face suddenly, upon leaving the motel, with a police officer who was making a routine check, and shot him at close range.

The facts relevant to the Reasons for Granting Certiorari will be discussed more in detail below in the proposition, including certain facts which the Oklahoma Court of Criminal Appeals set forth and which are not consistent with the record at trial.

The Oklahoma Court, per Judge Bussey, provided the following account of the crime in its Opinion, page 1.

> The facts are that about 1:50 a.m. on January 5, 1983, the night clerk at the Los Cuartos Inn located in Elk City, Oklahoma was robbed by two black men, one of whom was later identified as being the appellant. After the first man left, and before the appellant could leave, a police officer, Sargeant Steve Mahan, pulled up in his vehicle on a routine check and was shot three times in the head by the appellant.

Mr. Ross was not tried with the other two co-defendants, who had pled guilty to Second Degree Murder in return for forty (40) year sentences. (O.R. 108-09; 132-33).

**Pre-trial Motions**

Petitioner has referred to his Motion for Change of Venue above in the Statement of the Case. Because of concern for prejudice and the lack of black persons in the area petitioners trial attorney had prior to trial moved for discovery of prior jury service, for additional jurors, for sequestering of the jury, for a separate jury as to sentencing, for a restriction of prosecutorial strikes, and for additional peremptory challenges. (O.R. 142-156). Mr. Ross was offered life prior to trial and accepted, but the State changed its mind. Mr. Ross was not allowed to use this in mitigation at trial. (Tr. 1055-1069; O.R. 225).

The trial attorney also filed motions challenging "death qualification; to "life qualify" the jury, and for individual voir dire. (O.R. 157-164; 264-281). The attorney moved for funds to hire expert witnesses and for an investigator. (O.R.



168-174). The trial court refused to grant the above motions. Numerous other motions had been filed.

**Jury Selection**

As addressed in detail below, the trial court refuses to excuse a prospective juror for cause who twice stated that he would automatically impose the death penalty upon a finding of guilt. (Tr. 378-79). The trial court readily excused for cause jurors expressing general, conscientious objections to the death penalty. (Tr. 253-261; 277-283; 289-290).

Voir dire confirmed the fears expressed in petitioner's previous Motion for Change of Venue, that prospective jurors in the adjoining county to which the case was transferred had still been exposed to prejudicial media publicity in the area about the incident, and no black persons were called to the jury panel (See Tr. 475 -- objection for this reason).

**Preservation of Issues**

Both trial issues raised in this petition were raised at the trial. Petitioner's attorney challenged for cause the prospective juror who had twice stated that he would automatically vote for the death penalty. (Tr. 378-79). After being forced to use a peremptory challenge, the attorney later orally objected to the entire jury panel (Tr. 475). The attorney had earlier moved for additional peremptory challenges. (O.R. 153-54). The attorney objected in the motion for new trial and the issue was addressed on appeal by the Oklahoma Court of Criminal Appeals.

Petitioner's attorney objected to the instruction of the jury on the "risk of death" aggravating circumstance based on no evidence and it was raised in the motion for new trial (Tr. 1016-18). The issue was considered on appeal below. The issue of the failure to conduct a proportionality review did not arise until the opinion was rendered in this case.

**Judgment of the Court of Criminal Appeals**

The Oklahoma Court rejected the defendant's numerous arguments on appeal.

The appellate court discussed the two trial issues presented in this petition, and refused to conduct a proportionality review on appeal. (Again -- only Judge Bussey, and Judge Brett concurring, took any part in the opinion). The appellate court acknowledged error in the trial court's refusal to excuse the prospective juror for cause, but found it harmless because no objectionable juror was shown. (Opinion, p. 4). The appellate court greatly broadened its enterpretation of the "risk of death" circumstance to uphold the jury finding.

The Oklahoma appellate court's exact treatment of the issues is dealt with in detail within the relevant proposition below.

## REASONS FOR GRANTING WRIT OF CERTIORARI

### I

**THE TRIAL COURT COMMITTED ERROR OF A CONSTITUTIONAL MAGNITUDE, ACKNOWLEDGED ON APPEAL BELOW, WHICH VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL AND THE OKLAHOMA COURT OF CRIMINAL APPEALS' TREATMENT OF THE ERROR IS IN CONFLICT WITH BOTH FEDERAL APPEAL COURTS AND OTHER STATE COURTS OF LAST RESORT**

The trial court during voir dire refused to excuse for cause a prospective juror who had twice stated that he would automatically vote for the death penalty. (Tr. 378; 389-90). Indeed, the Oklahoma Court of Criminal Appeals, Opinion at p. 4, concurs that the trial court thus committed error.[3] (Note, that of the three judges on the Oklahoma Court Judge Brett concurred in Judge Bussey's Opinion with Judge Parks not indicated as participating or not participating).

There is little doubt that at least since Witherspoon v. Illinois, 391 U.S. 510, 521-22, 88 S. Ct. 1770 (1968), and under this Court's related authority since then, e.g. Lockhart v. McCree, ___ U.S. ___, 106 S. Ct. 1758, 1768-70 (1986), a trial

3. Judge Bussey cited Stroud v. United States, 251 U.S. 15, 40 S. Ct. 176 (1919), reh. denied, 251 U.S. 380, 40 S. Ct. 176 (1920) in holding that refusing to excuse for cause a prospective juror who would automatically vote for death was error.



court's error in refusing to excuse for cause a juror who is automatically disposed to render the death penalty, is a federal constitutional error.

It is a clear violation of "constitutional standards" regarding prospective jurors in a capital case, as the Court referred to in Lockhart, citing Wainwright v. Witt, 469 U.S. ___, 105 S. Ct. 844 (1985). See 106 S. Ct. at 1761 n. 4. The refusal to consider the punishment of life would clearly "prevent or substantially impair" a juror's performance of his duties, regarding oath and instructions. Lockhart, supra; Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521 (1980). Oklahoma, 21 O.S., 1981 Section 701.11, requires a juror to consider a life sentence, as did the trial court's instructions. (O.R. 350, 354).

Furthermore, Justice Steven's dissent in Lockhart, 106 S. Ct. at 1775-76, correctly noted that it was the manner of jury selection itself that violated the constitution, not the actual jury selected, in Witherspoon. The acknowledged error here transpired in the specific context of "capital sentencing" the majority said caused far greater concern in jury selection in Lockhart, 106 S. Ct. at 1769-70.

The petitioner showed prejudice below[4] and at trial had exhausted his peremptory challenges, including at least one as a result of the trial court's error. Despite acknowledging the error in Mr. Ross' case, Judge Bussey, for the Oklahoma Court of Criminal Appeals, held:

4. For an example of a juror who did serve on the jury, the trial transcript (Tr. 437-38) shows that juror Scroggins had indicated a disposition very favorable to the death penalty during voir dire. The defense attorney used his last peremptory challenge on a prospective juror who had been in law enforcement in the area. (Tr. 440-57) Also attached in the appendix (A-45) is a newspaper article where the prosecutor at trial, predicting reversal or modification of the case by the Oklahoma Court of Criminal Appeals, is quoted that the trial judge felt there was one juror who did not state with sufficient clarity that he would consider a life sentence.

> The record reflects that defense counsel challenged the prospective juror for cause, and when the trial court denied the challenge, defense counsel used a peremptory challenge. All of appellant's peremptory challenges were subsequently used; but as there is nothing in the record to show that any juror who sat on the trial was objectionable, we are unable to discover any grounds for reversal.

(COCA Opinion, p. 4). There exists much authority for reversal, as fully discussed below. The case of Ferrell v. State, 475 P.2d 825 (Okl. Cr. 1970), relied on by Judge Bussey, is readily distinguishable because there the Oklahoma court found that the trial court did not err. In Mr. Ross' case error was conceded as to the refusal to excuse for cause, and in a capital case context.

It is difficult to conceive how juror bias, etc. could actually be shown without interviewing the jury. See note 2, supra. This is especially unfair treatment of an error, in a capital case, which has for so long and widely been held reversible error on the genuine reduction of peremptory challenges. The defense attorney had moved for additional peremptory challenges and objected to the composition of the jury panel at trial. (O.R. 153; Tr. 475).[5]

The Oklahoma Court of Criminal Appeals failed to address and consider in its opinion that the trial court's error here was not a mere abuse of discretion purely under State law, but was error under the consitutionally mandated standards for death-penalty cases gleened from Lockhart, supra, via Witherspoon, supra. The error clearly implicated the petitioner's Sixth amendment rights. See Wainwright v. Witt, 469 U.S. ___ 105 S. Ct. 844 (1985).

The case of Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 399 (1976) holds that the erroneous excusal of even one juror constitutionally invalidates the death penalty. Correspondingly, a trial court's erroneous refusal to excuse for cause a juror automatically disposed to give the death penalty should be

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5. Bobby Lynn Ross was a black defendant. The crime occurred in Beckham county and pursuant to a granted change of venue was transferred to Roger Mills County, both in western Oklahoma. Orally before trial defendant's attorney objected that no blacks were among the jurors called (Tr. 475), and moved to quash the entire panel.



considered of similarly serious consequences. There is little other way to enforce the right to a fair jury.

Judge Bussey's opinion also fails to address the long-recognized importance of a defendant's right to fully exercise his peremptory challenges under the Sixth Amendment right to an impartial jury and the Fourteenth Amendment right to due process of law. In Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965), involving a state criminal trial, this Court recognized that the peremptory challenge is:

> "one of the most important rights secured to the accused, Pointer v. United States, 151 U.S. 396, 408, 14 S. Ct. 410, 414, 38 L. Ed. 208. The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, supra; [additional citations omitted]

380 U.S. at 219, 85 S. Ct. at 835. The Court's recent opinion in Batson v. Kentucky, ___ U.S. ___, 106 S. Ct. 1712, 1713 (1986), had no adverse effect on the above principal from Swain, the focus of Batson having been directed at a specific use of peremptory challenges, not the impairment. In Justice Burger's dissent in Batson he noted that peremptory challenges have been said to involve a significant and recurring question of constitutional law. 106 S. Ct. at 1734-38, citing McCray v. New York, 461 U.S. 961, 963, 103 S. Ct. 2438, 2439 (1983); Swain, supra, and other cases.

In fact, the Oklahoma court's treatment of the admitted error on the part of the trial court is in conflict with most decisions from the federal circuit courts of appeal on this identical issue, which require reversal without a showing of prejudice because of the genuine reduction of peremptory challenges alone, as did Swain, supra. For a case with the same facts regarding the failure to excuse one juror for cause, see United States v. Martin, 749 F.2d 1514 (11th Cir. 1985) (reversible error without a showing of prejudice). The rule of law is based upon the inseparable importance of the peremptory challenge to the Sixth Amendment right to an impartial jury, apart from the protections of Witherpsoon in a capital case.

Other circuits follow Swain in the treatment of error found which involves the impairment of peremptory challenges. See,

United States v. Hill, 738 F.2d 152 (6th Cir. 1984); United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206, 103 S. Ct. 1194 (1984); United States v. Allsup, 566 F.2d 68 (9th Cir. 1977); United States v. Nell, 526 F.2d 1223 (5th Cir. 1976); United States v. Harris, 542 F.2d 1283 (7th Cir. 1976); United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977). Under all of the above authority, the error in Mr. Ross' case would have required reversal, irrespective of a showing of prejudice or the fact that it was a capital case.

It appears that the Second and Eighth Circuits may be in conflict with the above circuits and with Swain in regard to some kind of showing of prejudice in addition to this error. E.g. United States v. Bruton, 647 F.2d 618 (8th Cir. 1981) and United States v. Brown, 644 F.2d 101 (2nd Cir. 1981).

The Tenth Circuit Court of Appeals apparently has not ruled on this specific issue recently. However, the Oklahoma Court of Criminal Appeals' finding of harmless error in this case is also in conflict with at least two other state courts of last resort within the Tenth Circuit. See Mailor v. People, 200 Colo. 30, 612 P.2d 79 (Col. 1980); People v. Russo, 677 P.2d 386, 388 (Col. App. 1983); State v. Bailey, 605 P.2d 765 (Utah 1980).

Numerous cases recognize the inseparable importance of peremptory challenges to the Sixth Amendment guarantee of a fair and impartial jury, and to the due process right to a fair trial. See Swain, supra; Pointer v. United States, 151 U.S. 396, 408, 14 S. Ct. 410, 414, supra. In United States v. Nell, 526 F.2d 1223 (5th Cir. 1976), the Court of Appeals held that the abridgement of the full exercise of peremptory challenges put "at stake" the Sixth Amendment right to an impartial jury. 526 F.2d at 1220. See also, United States v. Rucker, 557 F.2d 1046, 1048 (4th Cir. 1977), where the Court discusses the essential and fundamental importance of the peremptory challenge to a fair and impartial jury trial. In United States v. Apodaca, 666 F.2d 89 (5th Cir. 1982), the Court recognized the Sixth Amendment right to an impartial jury was "principally implemented" through the system of challenges. 666 F.2d at 94.



Mr. Ross, when facing the death penalty in a state prosecution, should be entitled to the same Sixth and Fourteenth Amendment rights to a fair jury and due process as a federal criminal defendant. The right to exercise peremptory challenges bears the same importance to these constitutional rights in state court as it does in federal court. The right is just as an inseparable part of the constitutional guarantees. Again, Swain v. Alabama, supra, involved a state criminal trial. Oklahoma only allows 9 peremptory challenges in a capital case.

Because the trial court's error violated constitutional standards for capital cases and resulted in the genuine reduction of peremptory challenges, Oklahoma's treatment of the error as harmless in a captal case is clearly in conflict with federal authority regarding Sixth and Fourteenth Amendment rights, in two separate ways as addressed above. Authority on this issue involving direct appeal of a capital case from state court to the U.S. Supreme Court appears to be scarce.

In the context of federal habeas corpus proceedings, the Ninth Circuit in Hines v. Enomoto, 658 F.2d 667 (9th Cir. 1981), found that the impairment of the right to exercise peremptory challenges violated that state-court defendant's right to an impartial trial under the Sixth and Fourteenth Amendments. 658 F.2d at 671-74. As noted in Hines, a requirement on direct appeal that the defendant show prejudice would render the enforcement of the right practically impossible. Id. at 674.

In the case of Celestine v. Blackburn, 750 F.2d 353, 360 (5th Cir. 1984), the Court of Appeals stated that the question of whether the effect of abridging the right to peremptory challenges implicates a Sixth Amendment right is an open one, even without the added element of constitutional voir dire standards being violated.

Under the facts of this case Mr. Ross' right to due process of law was violated as well. This is especially true in a death-penalty case where virtually all courts have acknowledged a higher standard of due process and the need for careful scrutiny.

E.g. Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222 (1957); Stein v. New York, 346 U.S. 156, 196, 73 S. Ct. 1077, 1098 (1953). See also, Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 2747 (1983).

The trial court's refusal in Mr. Ross' case to strike for cause a juror who would automatically vote for death, was in stark contrast to its readiness to strike prospective jurors expressing basically general and conscientious reservations about the penalty of death. Prospective jurors Webb, Sanve, and Stacher at best expressed a general, equivocal and understandable uncertainty about rendering a death sentence. (Tr. 258-61; 277-83; 287-90). None of them expressed unequivocally that they automatically vote against the death penalty. They were not asked if they could set aside their personal convictions and follow the law. Yet, all were excused for cause. See Witherspoon v. Illinois, supra, 391 U.S. at 520-23. See also Wainwright v. Witt, 469 U.S. ___, (1985); Adams v. Texas, 448 U.S. 38, S. Ct. (1980). The Oklahoma Court of Criminal Appeals finding that no error resulted from the striking for cause of these jurors is in marked contrast to the interpretation of Witherspoon found in White v. State, 674 P.2d 31, 32-36 (Okl. Cr. 1983) and Coleman v. State, 670 P.2d 596, 597-99 (Okl. Cr. 1983). This contrast further emphasizes the unfairness.

The Court should grant certiorari to vindicate Mr. Ross' Sixth and Fourteenth Amendment rights, the violation of which was held harmless in a capital case below, in conflict with ample and persuasive authority.

## II

**THE OKLAHOMA COURT OF CRIMINAL APPEALS HAS IN THIS CASE IMPARTED AN UNCONSTITUTIONALLY BROAD AND VAGUE CONSTRUCTION TO THE PHRASE, "KNOWINGLY CREATED A GREAT RISK OF DEATH TO MORE THAN ONE PERSON"**

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There was in Mr. Ross' case no evidence sufficient to support the aggravating circumstance within constitutional limitations. The uncontradicted facts of this case show that at best the state showed that the petitioner and a co-defendant



entered a motel at a time when only the night clerk was present. The motel office was robbed and the night clerk was left lying on the floor unharmed inside the motel office, which was also inside the motel. The night clerk never saw a gun, only a bulge in the co-defendant's pocket. (Tr. 574-622). She also specifically denied seeing the petitioner with a gun, having dwelt on his empty hands (Tr. 578). The night clerk attributed verbal threats, to insure cooperation, to the co-defendant who had the bulge in his pocket. (Tr. 579-83) A couple of times the night clerk indicated that "they" threatened her (Tr. 580), but she never specifically attributed a single verbal threat to this petitioner. (Tr. 582) The whole episode lasted five minutes. (Tr. 586).

In the best light to the State the facts show that later, upon leaving the motel and by sheer coincidence, the petitioner was outside the front of the motel door when he came face to face with an Elk City Police Officer who had just happened by on a routine check. It was there outside the motel that the close range gunshots led to the officer's death. (Tr. 583-594).

Over the defense objection to the evidence in support (Tr. 1016-18), the trial court instructed the jury on the aggravating circumstance that the defendant "knowingly created the great risk of death to more than one person",[6] (O.R. 345, 349), and the jury found the aggravating circumstance existed. (O.R. 358).

The Oklahoma Court of Criminal Appeals apparently recognized in the opinion that the broadest enterpretation it had previously given § 701.12(2) was in Hays v. State, 617 P.2d 223 (Okl. Cr. 1980), where a defendant had pointed a weapon at a group of teenagers after he had committed a murder. (Opinion, page 8-9).

In upholding the jury finding in Mr. Ross' case, Judge Bussey summarized the evidence in support:

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6. Title 21, Ok. Stat. § 701.12 provides that Aggravating circumstances shall be: .... (2) The defendant knowingly created the great risk of death to more than one person;

> The Appellant threatened the motel clerk with death if she did not cooperate. His shooting of the police officer showed his willingness to act on the threat, and she was in the immediate area when Office Mahan was shot.

(Opinion, page 9). This is sheer speculation.

The question is thus raised whether verbal threats inside a building, never attributed directly to this petitioner and at time when he admittedly held no weapon, support § 701.12(2), when an officer is later shot outside the building, with no one else outside.

Oklahoma has never considered the facts outside those involved in the transaction on trial, to construe support for § 701.12(2).[7] Further, Oklahoma requires a jury to balance aggravating circumstances versus mitigating cirsumstances when deciding whether to impose death. See Title 21, Ok. Stat. § 701.11; Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 2741 n. 12, 2750 (1983).

As Judge Cornish of the Oklahoma Court eloquently expressed in Johnson v. State, 665 P.2d 815, 826 (Okl. Cr. 1983) and Boutwell v. State 659 P.2d 322, 329 (Okl. Cr. 1983), Oklahoma refuses to speculate on the effect of an infirm aggravating circumstance, instead modifying the sentence of death to life imprisonment. This is still the law. Quite simply, the finding of support for this aggravating circumstance by the Court of Criminal Appeals was the difference in life or death for Mr. Ross.

There are constitutional limitations to the breadth of construction a state court of last resort may place on aggravating circumstances. This Court has repeatedly recognized that a system could have standards so vague as to fail to channel the sentencing patterns of juries. E.g., Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2742 (1983), quoting Gregg, infra. This point had been made clear in Godfrey v. Georgia, 446 U.S.

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7. For Example, See Robison v. State, 677 P.2d 1080 (Okl. Cr. 1984); Davis v. State, 665 P.2d 1186 (Okl. Cr. 1983); Jones v. State, 648 P.2d 1251, 1259-60 (Okl. Cr. 1982); Burrows v. State, 640 P.2d 533, 553 (Okl. Cr. 1982); Chaney v. State, 612 P.2d 269 (Okl. Cr. 1980). In Burrows, Judge Cornish noted that no one else was in the line of fire when that defendant shot his wife.



420, 100 S.Ct. 1759, 1764-66 (1980), where the Georgia Supreme Court's construction of an aggravating circumstance was unconstitutionally broad and vague. In Godfrey there was nothing in the Georgia court's construction of a different aggravating circumstance to imply any inherent restraint on the arbitrary and capricious infliction of the death penalty, because a person could characterize almost every murder under such a construction.

By indulging in such speculation as does the Oklahoma Court of Criminal Appeals' construction for § 701.12(2), almost any juror could characterize most murder transactions and murder defendants as having involved the knowing creation of the great risk of death to more than one person, absent the total isolation of the defendant and the victim. The aggravating circumstance, however, must be selective on some rational principal, which the above enterpretation does not provide for § 701.12(2). See also Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 2935 (1976), addressing Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972).

In Gregg, this Court noted that a very similar Georgia aggravating circumstance relating to a "great risk of death to more than one person" might be susceptible of an overbroad enterpretation. 96 S. Ct. at 2939. (Emphasis added). However, this Court approved Georgia's construction in Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1974), where a man fired a gun indiscriminantly into a church audience. This is the common sense construction most persons would put on the phrase. Yet, Oklahoma's construction of § 701.12(2) has broadened and moved further and further away from the plain meaning of a dangerous act that knowingly involves the creation of a great risk of death to more than one person.

Can the Oklahoma Court of Criminal Appeals constitutionally ignore in § 701.12(2) the legislatively inserted term "knowingly"? The petitioner had absolutely no way of knowing when he entered the motel that a police officer would later happen by on a routine patrol, a pure coincidence. The great risk of death could not have been created knowingly at that time.

It is easily distinguishable from shooting into crowds or multiple kidnappings, etc.

Absent that, verbal threats not specifically attributed to the petitioner, who then wielded no weapon, cannot be sufficient to prove the knowing creation a great risk of death to more than one person. Where is such a great risk of death to more than one from a verbal threat, even apart from "knowingly"? The unmanageable breadth of the Oklahoma Court's construction is obvious, even if this petitioner had made the threats. The record shows he did not. This construction indulges in speculation and little more.

The Court of Criminal Appeals, in all due respect, is wrong in saying the motel clerk was "in the immediate area." (Opinion, page 9). She was left unharmed, again, on the floor behind a desk inside the motel office which was inside the motel. The record is clear on this. The officer was shot at close range outside. The motel clerk was no more in the "immediate area" than were the tenants inside motel rooms asleep. At this later time,the only time the record indicates the petitioner had a gun, no one else was in the immediate area. No "knowing" risk to more than one was here created.

The offered support for this finding not only indulges in sheer speculaton, but ignores the very phrase itself. How could any jury use the phrase to legitimately narrow the class of persons for which death is a proper punishment? No other courts have allowed such broad speculation on the facts of a case to support similar phrases. E.g., see White v. State, 403 So.2d 331 (Fla. 1981). (Similar speculation is criticized.) Except for ah isolated one-on-one confrontation, miles from any other people, any juror could speculate that any murder transaction wherein the defendant has come into contact with more than person satisfies this phrase, whether or not he even then had a gun or made any verbal threats himself.

The United States Supreme Court cases from Florida cited by the Oklahoma Court in its opinion (page 9) in no way furnish support for their construction. The facts of each Florida case



indicate a purposeful creation of a great risk of death to persons at one single time. More importantly, each case involved Florida's distinguishable harmless error rule, where other aggravating circumstances were present and there was no statutory mitigating circumstances. See Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976), reh. denied, 429 U.S. 875, 97 S. Ct. 198 (1976); Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418 (1983).

In fact, this Court noted in Proffitt, 96 S. Ct. at 2968 n. 13, that the Florida Supreme Court had not even expressly ruled on the propriety of the "risk of death" circumstance under those facts. See also Barclay, 103 S. Ct. at 3435 n. 16. Oklahoma's rule on improper aggravating circumstances, noted above, creates a very different situation, even if the facts at bar were not so distinguishable.

The jury's finding in Oklahoma is limited to the facts of the case on trial and there were none which support the finding of § 701.12(2) so as to provide a "meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not." Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 1764 (1980). The Oklahoma Court's construction of § 701.12(2) in this case violates the eighth and fourteenth amendments to the United States Constitution.

As the Oklahoma Court of Criminal Appeals has shirked its obligation to provide a sufficiently narrow and meaningful construction of an aggravating circumstance, which circumstance authorized Mr. Ross' death, certiorari should be granted.

## III

**THE OKLAHOMA COURT OF CRIMINAL APPEALS' APPLICATION OF 21 O.S. 1985, § 701.13 TO REFUSE TO CONDUCT A COMPARATIVE PROPORTIONALITY REVIEW IN MR. ROSS' APPEAL VIOLATES THE UNITED STATES CONSTITUTIONAL GUARANTEE PROSCRIBING EX POST FACTO LAWS.**

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Mr. Ross' appeal was perfected well before the Oklahoma legislature amended 21 O.S. 1985, section 701.13 to eliminate the Oklahoma Court of Criminal Appeal's mandatory requirement to conduct a proportionality review of other, similar cases and defendants. The crime for which Mr. Ross was convicted

transpired long before the Oklahoma amendment.[8] Although the published opinion in Ross v. State, 717 P.2d 117 (Okl. Cr. 1986) creates the impression that a proportionality review was conducted, the end of the case, 717 P.2d at 125, makes clear that none was conducted. The opinion itself makes clear none was conducted. See A-12. In Newsted v. State, ___ P.2d ___, 57 OBJ 1364, 1368 (Okl. Cr. 1986), Judge Bussey even cites Ross v. State for the proposition that the proportionality review is retroactively unnecessary.

In Green v. State, 713 P.2d 1032, 1041 (n. 4) (Okl. Cr. 1985), a majority of the Oklahoma Court had held that the revision of § 701.13 would not apply to capital cases on appeal before the statute was altered, because to do otherwise would violate the ex post facto rule.

This position was reversed in Brewer v. State, 718 P.2d 354, 366 n. 1 (Okl. Cr. 1986), on the basis that the amendment was procedural. The holding was improper for several reasons. One is that the Oklahoma Court lacked the power to declare the statute had a retroactive effect. In Oklahoma a statute or amendment has a prospective effect only, unless the legislature clearly expresses the intent to make a statute retroactive. Rea v. Wichita Mortgage Corp., 747 F.2d 567, 571 (10th Cir. 1984); Wilson v. State ex rel. Oklahoma Tax Commission, 594 P.2d 1210, 1212-13 (Okl. 1979). The amendment at Title 210.5 1985, 701.13 does not contain a retroactivity clause, it merely eliminates the former 701.13(c)(3).

Aside from the above, the retroactive application of the amendment to Mr. Ross' case violates the federal constitution's ex post facto clause. U.S. Const., art. I, section 10, clause 1. The protection from ex post facto laws is essential to ordered liberty and is incorporated into the fourteenth amendment. It cannot be abridged by state courts. Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697 (1964). See also Marks v. United States, 430 U.S. 188, 191-92, 97 S. Ct. 990, 992-93 (1977). The Oklahoma Court's action in Mr. Ross' case runs afoul of this principal.

A retrospectively applied statute which disadvantages substantial rights violates the ex post facto rule, even if it is worded procedurally. Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 964 (1981). This has long been the law. See Thompson v. Utah, 170 U.S. 343, 354-55, 18 S. Ct. 620, 624 (1898). In Weaver it is made clear that a law which merely alters punishment, and is more onerous than the old provisions, violates the ex post facto rule. 450 U.S. at 30, 101 S. Ct. at 965.

The more than substantial affect on Mr. Ross' rights is clear here where he cited the Oklahoma Court to two cases on appeal at the time of Mr. Ross' case, where similar defendants who shot and killed police officers shortly after the commission of a crime received life sentences.[9]

The right to have his sentence modified to life if it is disproportionate to similar cases and defendants is substantial. It affects the "quantum of punishment". Weaver v. Graham, supra, 450 U.S. at 32, 101 S. Ct. at 966; Dobbert v. Florida, 432 U.S. 282, 293-94, 97 S. Ct. 2290, 2298 (1977). See also, Lindsey v. Washington, 301 U.S. 387, 401-02, 57 S. Ct. 797, 799 (1937).

In Weaver, the court found violative the retroactive application of a statute reducing the number of "good time" credits. Modification from death to life is a potentially vital factor to Mr. Ross' sentence. It is tantamount to the elimination of a sentencing option. See United States v. Countryman, 758 F.2d 574, 579 n. 2 (11th Cir. 1985). As the power to modify to life is severely curtailed by the amendment here, the standard of punishment is severely curtailed. See Lindsey v. Washington, supra. It cannot be said that the new statute is either procedural only or "on the whole ameliorative." Dobbert v. Florida, supra, 432 U.S. at 293-94, 97 S. Ct. at 2298.

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8. 21 O.S. 1985 § 701.13 (effective July 16, 1985) eliminated the prior 701.13 (c)(3) which stated that the court shall determine: whether the sentence ofdeath is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

9. Melvin v. State 706 P.2d 163 (Okl. Cr. 1985), No. F-83-618; Brown v. State ___ P.2d ___ (Okl. Cr. ), No. F-84-626

Also, Judge Parks of the three judge Oklahoma Court of Criminal Appeals did not participate in the opinion in Mr. Ross' case or even indicate that he was not participating. He did not sign the order denying rehearing. Yet, Judge Parks, in apparent dissent to the retroactive application of the amendment, has conducted his own proportionality review in certain cases on appeal before the amendment despite the Brewer holding. See Newsted v. State, ___ P.2d ___, 57 O.B.J. 1364, 1369 (Okl. Cr. 1985).

Thus, Mr. Ross had the amendment applied in violation of the ex post facto rule and failed to receive the benefit of Judge Parks' own review, because Judge Parks took no part in the opinion.

Certiorari should be granted so that Mr. Ross receives the constitutional right to mandatory treatment of his punishment under the prior statute.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this petition for writ of certiorari be granted. Also, petitioner respectfully requests that the judgment and death sentence affirmed by the Oklahoma Court of Criminal Appeals be vacated, that the case be remanded for new trial or the death sentence modified to life, and for whatever other relief the Court deems appropriate.

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# OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
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No. 86-5309

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

BOBBY LYNN ROSS

Petitioner

vs.

THE STATE OF OKLAHOMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Petitioner was denied a trial by a fair and impartial jury from the trial court's failure to excuse for cause a venireperson committed to the death penalty when that venireperson was subsequently excused by peremptory challenge.

2. Whether the aggravating circumstance that "the defendant knowingly created a great risk of death to more than one person is constitutionally overbroad as applied to Petitioner.

3. Whether the United States Constitution through either the Eighth Amendment or the Ex Post Facto Clause mandates proportionality review.



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No. 86-5309

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October Term, 1985

BOBBY LYNN ROSS

Petitioner

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THE STATE OF OKLAHOMA

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 717 P.2d 117 (Okla.Crim.App. 1986).

JURISDICTION

The Opinion of the Oklahoma Court of Criminal Appeals was entered on April 4, 1986. Rehearing was denied on April 28, 1986. This Court's jurisdiction is purportedly invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10 of the United States Constitution provides, in relevant part:

> "Section 10. No State shall . . . pass any . . . ex post facto Law. . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in relevant part:

> Excess bail shall not be required, . . . nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Okla.Stat.tit. 21, § 701.7 (West Supp. 1982) provides in part:

> A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.
>
> B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Okla.Stat.tit. 21, § 701.9 (West 1981) provides in part:

> A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Okla.Stat.tit. 21, § 701.10 (West 1981) provides as follows:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. How-

ever, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla.Stat.tit. 21, § 701.11 (West 1981) provides as follows:

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla.Stat.tit. 21, § 701.12 (West 1981) provides as follows:

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing the lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Okla.Stat.tit. 21, § 701.13 (West 1981) provided as follows:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court,



within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, and factual substantiation of the verdict, and the validity of the sentence.

Okla.Stat.tit. 21, § 701.13 (West Supp. 1985), provides as follows:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The court reporter of the trial court shall prepare all transcripts necessary for appeal within six (6) months of the imposition of the sentence.

The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahom Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court. The defendant shall have one hundred twenty (120) days from the date of receipt by the court of the record, transcript notice, and report provided for in subsection A of this section, in which to submit a brief. The State shall have sixty (60) days from the date of filing of the defendant's brief to file a reply brief. The defendant may file a reply brief within a time period established by the court, however, the receipt of the reply brief, the hearing of oral arguments, and the rendering of a decision by the court all shall be concluded within one (1) year after the date of the filing of the reply brief. If the defendant or the state fails to submit their respective briefs within the period prescribed by law, the defendant or the state shall transmit a written statement of explanation to the Presiding Judge of the Court of Criminal Appeals who shall have the authority to grant an extension of the time to submit briefs, based upon a showing of just cause. Failure to submit briefs in the required time may be punishable as indirect contempt of court.

E. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for resentencing by the trial court.



F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

G. If the court reporter of the trial court fails to complete preparation of the transcripts necessary for appeal within the six-month period required by the provisions of subsection A of this section, the court reporter shall transmit a written statement of explanation of such failure to the Chief Justice of the Oklahona Supreme Court, the Presiding Judge of the Court of Criminal Appeals, and the Administrative Director of the Courts. The Court of Criminal Appeals, shall have the authority to grant an extension of time for filing the transcripts, based upon a showing of just cause. Failure to complete the transcripts in the required time may be punishable as indirect contempt of court and except for just cause shown may result in revocation of the license of the court reporter.

Okla.Stat.tit. 21, § 801 (West Supp. 1982), provides as follows:

Any person or persons who, with the use of any firarms or any othe: dangerous weapons, whether the firearm is loaded or not, or who uses a blank or imitation firearm capable of raising in the mind of the one threatened with such device a fear that it is a real firearm, attempts to rob or robs any person or persons, or who robs or attempts to rob any place of business, residence or banking institution or any other place inhabited or attended by any person or persons at any time, either day or night, shall be guilty of a felony, and, upon conviction therefor, shall suffer punishment by imprisonment for life, in the State Penitentiary, or for a period of time of not less than five (5) years, at the discretion of the court, or the jury trying the same.

Upon conviction therefor, any person guilty of three (3) separate and distinct felonies, in violation of this section shall suffer punishment by imprisonment for life, in the State Penitentiary, or for a period of time of not less than ten (10) years, and it is mandatory upon the court to impose no less than the minimum sentence of ten (10) years. The sentence imposed upon such person shall not be reduced to less than ten (10) calendar years, nor suspended, nor shall any person be eligible for probation or parole or receive any deduction from his sentence for good conduct until he shall have served ten (10) calendar years of such sentence.

## STATEMENT OF THE CASE

Bobby Lynn Ross (hereinafter referred to as the "Petitioner"), was tried by jury for the crimes of Murder in the First Degree in violation of Okla.Stat.tit. 21, § 701.7 (West Supp. 1982), and Robbery With a Firearm in violation of Okla.Stat.tit. 21, § 701.7 (West Supp. 1982), in Case No. CRF-83-27, in the District Court of Roger Mills County before the Honorable Gary P. McGinn, District Judge. The jury returned a verdict of guilty and set punishment at death by lethal injection for the murder conviction and ninety (90) years imprisonment for the robbery conviction. The trial court sentenced the Petitioner in accordance with the jury's verdict.

The Oklahoma Court of Criminal Appeals in Ross v. State, 717 P.2d 117 (Okla.Crim.App. 1986), in an opinion written by Judge Bussey and concurred in by Judge Brett, affirmed the convictions and sentences imposed. Judge Parks did not participate in consideration of the case.

During the early morning hours of January 5, 1983, Debra Jean Sandefur was working as a night clerk/bookkeeper at the Los Cuartos Inn located at 1100 Highway 34 in Beckham County, Oklahoma (Tr. 563,573). As Ms. Sandefur sat in the office balancing the books and making the daily deposit, a young black man wearing a light gray windbreaker knocked at the door (Tr. 574). Ms. Sandefur got up, unlocked the door, opened it slightly and asked the young man if she could help him (Tr. 575). The man asked about the price of a room and Ms. Sandefur responded that the price was $25.00 plus tax (Tr. 575). Because the young man hesitated for a moment, Ms. Sandefur referred him to the Royal Inn across the street, which had lower rates (Tr. 575). The man smiled and stated that he would have to go and talk to his girlfriend and see if she wanted to spent the night anyway. Meanwhile, Ms. Sandefur thought it was strange that she could hear a car running but could not see one.

Approximately ten minutes later, which was around 2:00 a.m., as Ms. Sandefur concluded her paper work and had closed the office door almost all of the way, she heard the door rattle as she



was walking toward the kitchen to eat her lunch (Tr. 576). The young man had returned. As he smiled and waved, Ms. Sandefur went and answered him through the closed door (Tr. 576). The man replied that his girlfriend wanted to stay and Ms. Sandefur then unlocked the door. As she walked back toward the front desk in the office, the man grabbed her from behind, placed his fist to her neck, poked her in the back and said, "This is a gun. If you don't do what I say I'll shoot you." (Tr. 577). He then added, "This is a hol-, this is a robbery. Do what I say or I'll shoot you." Although he had an object protruding out of his pocket, Ms. Sandefur did not actually see a gun (Tr. 577).

During the time that the man wearing the gray windbreaker was ordering Ms. Sandefur to do as he said, another man, whom Ms. Sandefur identified in court as the defendant (Tr. 618), entered the office (Tr. 578). The defendant was dressed in black pants, a black shirt and he wore a black scarf on his head. After the man in gray had twice asked where the money was, the defendant stated to Ms. Sandefur, "You better tell the truth or I'll kill you." (Tr. 579).

Ms. Sandefur told the men that the money was in the back office, and as they went to get it, they noticed that the door was partly closed and a light was on back there. Then they stopped and asked Ms. Sandefur if anyone was back there. After she assured the men that no one was in the back office, they became somewhat upset and warned her that she had better not be lying (Tr. 580).

When they reached the back office, Ms. Sandefur showed the men the file drawer containing the money bags and they ordered her to remove them (Tr. 582). After she had complied with that demand, one of the men ordered her to get down on the floor and keep her head down. As she followed this instruction, her glasses fell off. When she reached for them, the man in the gray jacket put his foot on the back of her head and ordered her to stay down or they would kill her (Tr. 582). As the men exited the office, the defendant again admonished Ms. Sandefur to keep her head down or else (Tr. 583).

Within a moment after they had exited the office, Ms. Sandefur heard someone hit the door leading to the cloakroom. As she moved her foot, one of the men yelled, "just stay down." (Tr. 585). At that time, Ms. Sandefur was somewhat puzzled as to how the men knew she had moved her foot until she observed them watching her through the window that looks into the kitchen (Tr. 585).

After hearing some movement at the door, Ms. Sandefur the heard three shots, which caused her to become more frightened because she could not understand why the men shot since they had already frightened her enough (Tr. 586). However, she soon realized that someone had been shot (Tr. 586). Because the local police usually made rounds, she thought one might be involved. As she started to stand up, she heard more sounds and became more frightened (Tr. 587). The ensuing quietness increased her suspicion that a police officer had been shot (Tr. 587). To confirm that suspicion, she crawled to the office door, opened it, went to the counter area and peeked over the top. From her vantage point, she observed the back of a police car, with the door open and an officer laying on the ground (Tr. 590). She did not see the two men, one of whom was the defendant (Tr. 590).

Ms. Sandefur then returned to the office, closed the door, called the police and reported the robbery and the shooting (Tr. 590). At the request of the officer on the phone, Ms. Sandefur went to look at the officer who was shot (Tr. 591). She observed that he was bleeding from his head and she reported this to the dispatcher. Meanwhile, the other phones in the office started ringing. Despite the dispatcher's efforts to keep Ms. Sandefur on the phone for her safety, Ms. Sandefur attempted to aid the wounded officer who was lying on the ground, face down and breathing irregularly (Tr. 592-593).

Meanwhile, Elk City police officer James D. LaFerlette, along with several other police officers, responded to the call from Ms. Sandefur at approximately 2:08 a.m., three minutes after it was placed (Tr. 626-628). He and Officer Clyde E. Davis, also from the Elk City Police Department, observed the wounded officer, Steven Mahan, lying face down, bleeding profusely from his head and mouth (Tr. 631). Because the ambulance had not arrived (Tr. 630), and because the wounded officer had stopped breathing and his pulse had stopped (Tr. 595), Officer LaFarlette and Davis decided to cancel the request for an ambulance and transported Officer Mahan to a hospital in one of the patrol units. Officer LaFarlette, accompanied by Ms. Sandefur, drove the wounded officer to the Elk City Community Hospital emergency room (Tr. 631).

While at the hospital, Officer LaFarlette learned that the wounded officer's service revolver was missing (Tr. 632). Officer LaFarlette checked the patrol unit, but did not find the missing gun. He then remained at the hospital until his comrade was transported by ambulance enroute to Oklahoma City (Tr. 634).

While enroute to Oklahoma City, the wounded officer lost his pulse and was taken instead to El Reno Hospital where resuscitation efforts failed to revive him (Tr. 638-640). At approximately 9:40 a.m. that same day, he was pronounced dead by Dr. Kenneth L. Preacher (Tr. 643). The doctor stated that the wounded officer had died from gunshot wounds to his head (Tr. 644).

Meanwhile, Officer Davis secured the crime scene (Tr. 650-653). He and several other officers at the scene had received descriptions of the suspects. Another of the officers there began a search of the parking lot area for the suspects (Tr. 665).

The description from the dispatcher described one of the men as approximately five foot, eleven inches, wearing dark clothes, including a black shirt, black slacks and some type of black scarf around his head, and having a very thin face (Tr. 667). The other man was described as approximately five foot, eight to nine inches; wearing a gray quilted jacket having a shiny texture, dark slacks and dark gloves (Tr. 667). This suspect was also described as wearing a goatee (Tr. 667). This dispatch was broadcasted to all police officer who were listening to the radio (Tr. 669).

One of the officers who received a call about the shooting of an officer and a robbery in Elk City was Mark Lumpkin, the patrol supervisor for the Clinton Police Department (Tr. 695-

697). As a result, he assigned positions to each of the men on his shift to cover the exits from the freeway into Clinton from the west (Tr. 697). He and his partner took the exit at Interstate 40 and Highway 183 at the south side of town (Tr. 697-698).

At approximately 2:26 a.m. that same day, Officer Lumpkin observed a 1976 white Buick LaSabre with an unknown number of occupants coming from the west on Interstate 40 and exit on Highway 183 (Tr. 698-700). Because the vehicle had a defective tail light and an unsafe windshield, he stopped it on a traffic violation (Tr. 698-701).

Upon stopping the vehicle, Officer Lumpkin observed the driver of the vehicle, whom the officer knew personally as Mitchell Henderson, jump out of the car from the driver's side and walk toward the officer (Tr. 702). However, at the officer's request, Henderson, who was wearing a gray jacket, stopped and remained at the car. At that time, Officer Lumpkin observed that there were two other occupants in the stopped vehicle (Tr. 702). Because the officer was very familiar with Hendereon's reputation for carrying weapons, he requested the individual on the passenger's side to exit the stopped vehicle (Tr. 703). This individual was wearing a black shirt, black pants and shoes (Tr. 703). Because the door on the passenger's side was jammed, this individual exited from the driver's side.

As the second passenger exited the vehicle, Officer Lumpkin recalled the information previously given to him concerning th description of the suspects in the dispatch from Elk City (Tr. 704). He then advised the three men to place their hands on the car (Tr. 704). The three men were frisked, placed under arrest and read their Miranda rights. During this time, several other police officers arrived on the scene as backup. When the man dressed in black clothing was frisked, Officer Lumpkin removed an unloaded Bauer .25 caliber automatic from the man's pocket. At trial, the officer identified the defendant as that individual (Tr. 706-708).

A search incident to that arrest resulted in the seizure of two brown bank bags identified as being similar to the ones taken



from the Los Cuartos Motel (Tr. 981); a black jacket worn by the defendant; a gray jacket worn by Henderson; a Smith and Wesson 66 stainless .357 Magnum, having the same serial number as that carried by Officer Mahan, the deceased; a loaded .25 caliber pistol and some marijuana found in the vehicle (Tr. 719-725).

The men were subsequently transported from Clinton to Beckham County where they were charged with murder. Later that same morning around 4:00 a.m., the defendant made a taped statement after he had been fully advised of his constitutional rights (Tr. 882). Initially, he admitted the robbery, but denied having committed the murder. Rather, he claimed an unidentified individual appeared at the scene and killed the officer. However, when confronted with the accusation that he was lying, the defendant admitted shooting the officer (Tr. 915-919).

On the following day, the body of Officer Steven Mahan was transported to Oklahoma City where an autopsy was subsequently performed (Tr. 942). The results of that autopsy revealed that Officer Mahan died from multiple gunshot wounds to the head (Tr. 954). The forensic pathologist recovered the three bullets. He also found a gun powder residue in the wound tracks (Tr. 957).

The bullets removed from the victim's head were sent to the Oklahoma State Bureau of Investigation (O.S.B.I) laboratory where ballistic tests confirmed that they were definitely fired from the weapon which was seized from the defendant at the time of his arrest (Tr. 937-940). At trial, the ballistics expert testified that, in his opinion, the officer was shot at a very close range, up to six inches. The basis for this conclusion rests on the fact that there was gun powder residue found in the wound tract and the weapon in question would not leave residue at a distance of more than 24 inches (Tr. 942).

Various items of clothing seized from the defendant and the co-defendants were submitted to the O.S.B.I. laboratory for tests and comparisons. All of the shoes, including those worn by the defendant, were consistent with plaster casts of footprints made at the scene of the crime (Tr. 813-820).

In recreating the surrounding facts and circumstances which lead to the robbery of the Los Cuartos Inn and the murder of officer Steven Mahan, who unexpectedly arrived at the scene, the State called numerous witnesses in its case-in-chief, including the two co-defendants whose memories had supposedly lapsed. The defense called no witnesses in its case-in-chief. Rather, the defense presented a motion for a directed verdict at the end of the State's case. When the motion was denied, the defense rested. After closing arguments, the jury returned verdicts of guilty on both counts.

During the punishment stage of the trial, the State presented evidence that the defendant had previously been involved in a robbery-homicide (Tr. 1030-1039). The defense presented the testimony of the brother of the defendant. The brother related how the seven siblings had grown up with the parents separating when the defendant was very young. The brother also testified that he had seen the defendant earlier on the night in question. The defense also presented the testimony of a minister who had met and counseled the defendant in jail.

At closing arguments and deliberation, the jury sentenced the defendant to death after finding five aggravating circumstances. These were: (1) the defendant knowingly created a risk of death to more than one person; (2) the murder was especially heinous, atrocious, or cruel; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; (4) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (5) the victim was a law enforcement officer in the performance of his duties.



PROPOSITION I

PETITIONER MAKES NO SHOWING THAT HE WAS CONSTITUTIONALLY DEPRIVED OF AN IMPARTIAL JURY WHO WOULD CONSCIENTIOUSLY CARRY OUT THEIR SWORN DUTY TO APPLY THE LAW AND FIND THE FACTS.

Initially, Petitioner contends that the trial court committed constitutional error pursuant to the Sixth and Fourteenth Amendments when he was forced to use a peremptory challenge to remove one prospective juror who expressed that he would automatically vote for the death penalty. However, Petitioner has made no showing that any of the jurors who in fact decided his case was objectionable or that he was denied a fundamentally fair and impartial jury.

In Ross v. State, 717 P.2d 117 at 120 (Okla.Crim.App. 1986), Judge Bussey stated:

> The failure of the trial court to remove a prospective juror who unequivocally states that he is unwilling to follow the law during the penalty phase by considering a life sentence is error. See Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), reh. denied, 251 U.S. 380, 40 S.Ct. 176, 64 L.Ed. 317 (1920). See also Alvord v. Wainwright, 564 F.Supp. 459 (1983), aff'd. in part, rev'd in part, 725 F.2d 1282 (1984), cert denied, ___ U.S. ___, 105 S.Ct. 355, 83 L.Ed.2d 291 (1985). The record reflects that defense counsel challenged the prospective juror for cause, and when the court denied the challenge, defense counsel used a peremptory challenge. All of appellant's peremptory challenges were subsequently used; but as there is nothing in the record to show that any juror who sat on the trial was objectionable, we are unable to discover any grounds for reversal. See Stroud and Ferrell v. State, 475 P.2d 825 (Okl.Cr.1970).

Petitioner makes absolutely no showing that he was denied a fair and impartial jury who could "conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758, 1770 (1986). Petitioner was constitutionally entitled to a fair and impartial jury pursuant to the Sixth and Fourteenth Amendments.

In Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985), this Court held that "an impartial jury consists of nothing more than "jurors who will conscientiously apply the law and find the facts." Lockhart v. McCree, 106 S.Ct. at 1767.

Petitioner alleges that it was prejudicial for him to have had to expend a peremptory challenge which by its very nature is designed to eliminate undesireable jurors for any reason. He has not alleged that he was forced to accept an undesirable juror as the result of the trial court's refusal to excuse the veniremen in question. Thus, his right to remove a juror with a peremptory challenge has not been denied or impaired. For this reason the State submits that the defendant's rights have not been abridged. See Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986). To the contrary, every juror who heard Petitioner's case stated on the record that he or she would determine Petitioner's fate fairly and impartially (Tr. 76,116,142-143,172,187,194,245-246,337, 340,349,393,410,415,427,473).

Petitioner contends that he was prejudiced by the fact that he was forced to use one of his peremptory challenges to remove prospective juror Huling. However, Petitioner has not shown any fundamental deprivation of a constitutional right sufficient to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

> In Hopt v. Utah, 120 U.S. 430, 7 Sup.Ct.Rep. 614, it was decided by this court that when "a challenge by a defendant in a criminal action to a juror for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if, until the jury is completed, he has other peremptory challenges which he can use." And so in Hayes v. Missouri, 120 U.S. 71, 7 Sup.Ct.Rep. 350, it was said: "The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained."

Spies v. Illinois, 123 U.S. 131, 168 (1887).

Petitioner was afforded a trial by a fair and impartial jury to which he was constitutionally entitled, and no fundamental deprivation resulted.

As stated by this Court in Hayes v. Missouri, 120 U.S. 68, 71 (1887):

> In this country the power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury. In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there [sic] competent and impartial jurors. And to that end it may be a wise proceeding on the part of the legislature to enlarge the number of peremptory challenges in criminal cases tried in those cities. The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. Northern Pac. R. Co. v. Herbert, 116 U.S. 642; S.Ct. 6 Sup.Ct.Rep. 590. The right to challenge is the right to reject, not to select, a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained.



Without some requisite showing that the jury who sat in Petitioner's cause was constitutionally objectionable, the trial court's error in refusing to excuse prospective juror Huling for cause is harmless. Stroud v. United States, 251 U.S. 15 (1919); Holt v. United States, 218 U.S. 245 (1910); Spies v. Illinois, 123 U.S. 131 (1887); Hopt v. Utah, 120 U.S. 430 (1887); and Hayes v. Missouri, 120 U.S. 430 (1887).

Petitioner has shown no equal protection violation by the fact that venireman Huling was not removed for cause and a peremptory challenge was exhausted.

> "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder, supra, at 308, 25 L Ed 664; see Carter v Jury Commission of Greene County, 396 US 320, 330, 24 L Ed 2d 549, 90 S Ct 518 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Duncan v Louisiana, 391 US 145, 156, 20 L Ed 2d 491, 88 S Ct 1444 (1968). Those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Strauder, supra, at 309, 25 L Ed 664.
>
> [C]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See Thiel v Southern Pacific Co., 328 US 217, 223-224, 90 L Ed 1181, 66 S Ct 984 (1946).

Batson v. Kentucky, 106 S.Ct. at 1712-1713.

The United States Supreme Court has recognized that "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] grant peremptory challenges." Swain v. Alabama, 380 U.S. 202, 219 (1965), quoting Lewis v. United States, 146 U.S. 370, 376 (1892); Cf. Batson v. Kentucky, 106 S.Ct. at 1724 (wherein the State concedes "that the Constitution does not guarantee a right to peremptory challenges.").

The Court in Lewis v. United States, 146 U.S. 370 (1892), states that a peremptory challenge is necessary "to the fairness of trial by jury." Id., 146 U.S. at 376. However, the Court indicates that one reason a peremptory challenge is necessary to fairness of trial by jury is that "[b]ecause, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror. . ." the criminal defendant may peremptorily set him aside.

So then, the very reason for the existence of peremptory challenges is to set aside persons challenged for cause whom are not previously removed. In the present case, the Petitioner's use of a peremptory challenge to remove a juror not previously removed for cause is nothing more than an example of the exercise of the peremptory challenge for that which it was intended.

In Petitioner's case, he was afforded twelve jurors who vowed to "conscientiously apply the law and find the facts." Wainwright v. Witt, 105 S.Ct. at 852. The Constitution requires nothing more and Petitioner should be denied relief since he has suffered no fundamental deprivation of constitutional magnitude.

PROPOSITION II

THE JURY'S FINDING THAT THE PETITIONER KNOWINGLY CREATED A GREAT RISK OF DEATH TO MORE THAN ONE PERSON WAS NEITHER UNPRINCIPLED NOR ARBITRARY IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Petitioner asserts as his second reason for granting the writ that the aggravating circumstance of 21 O.S.1981, § 701.12 (2), "[T]he defendant knowingly created a great risk of death to more than one person," is constitutionally overbroad as applied to the circumstances of this case. He erroneously argues there



was "no evidence sufficient to support the aggravating circumstance within constitutional limitations." (Petitioner's brief, p. 11).

Contrary to Petitioner's interpretation, Respondent submits that the jury correctly applied Section 701.12(2) to the facts of this case. Furthermore, the Oklahoma Court of Criminal Appeals approved the jury's finding of this circumstance because, immediately prior to the murder of Officer Mahan, Petitioner had robbed the Los Cuartos Inn and:

> [T]hreatened the motel clerk with death if she did not cooperate. His shooting of the police officer showed his willingness to act on the threat, and she was in the immediate area when Officer Mahan was shot.

Ross v. State, 717 P.2d 117, 123 (Okla.Crim.App. 1986). Petitioner was engaged in flight from the armed robbery when he killed Officer Mahan in the motel parking lot.

This Court previously has addressed the sufficiency of a finding of great risk of death to many people in a situation where the victim was alone when he encountered the defendant in Barclay v. Florida, 463 U.S. 939 (1983). In that case, a black defendant and his four colleagues drove around Jacksonville, Florida, to kill whites. They eventually selected and killed a lone hitchhiker after engaging in several aborted attempts and having made their purpose known to the community by a taped threat.

As this Court indicated in Barclay v. Florida, 463 U.S. at 947, findings of several challenged aggravating circumstances:

> [W]ere made by the trial court and approved by the Florida Supreme Court under Florida law. Our review of these findings is limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution. We think they were not. It was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case.

(Emphasis added) (Footnote omitted). Similarly the jury found the great risk of death circumstance and the Oklahoma Court of Criminal Appeals approved that finding. This finding cannot be construed as irrational or arbitrary where moments prior to the fatal shooting of Officer Mahan, Petitioner had threatened to

kill the motel clerk on duty at the time of the incident. Petitioner's stated objective was to kill anyone obstructing his success in robbing the motel, creating a great risk of death to both the motel clerk and Officer Mahan.

This Court previously has approved of a finding of the aggravating circumstance that the defendant "knowingly created a great risk of death to many persons" by encompassing crimes unrelated to the offense for which the defendant had been found guilty in Alabama v. Evans, 461 U.S. 230, 233 (1983) (per curiam). If it is not arbitrary to establish this circumstance in a robbery-murder by evidence of other unconnected robberies, the Respondent submits it certainly is not capricious to determine that Petitioner knowingly created a great risk of death to more than one person by first threatening and robbing a motel clerk and then killing a police officer while escaping.

Petitioner relies upon Godfrey v. Georgia, 446 U.S. 420 (1980), in asserting that the Oklahoma interpretation of Section 701.12(2) is overbroad. However, this Court in Barclay v. Florida, 463 U.S. at 947 fn. 5, distinguished the Godfrey case because the one aggravating circumstance found in Godfrey that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," was contrary to the evidence that the two victims died instantly. A finding that Petitioner knowingly created great risk of death to more than one person is not contrary to the evidence herein.

## PROPOSITION III

PROPORTIONALITY REVIEW BY THE OKLAHOMA COURT OF CRIMINAL APPEALS IS NOT CONSTITUTIONALLY MANDATED BY THE EIGHTH AMENDMENT OR THE EX POST FACTO CLAUSE.

Petitioner asserts that the death penalty imposed in his case is disproportionate to sentences imposed in similar cases and that the failure of the Oklahoma Court of Criminal Appeals to address proportionality violates the Ex Post Facto Clause of the United States Constitution.



Contrary to Petitioner's assertion, there is no constitutional mandate to conduct proportionality review. Pulley v. Harris, 465 U.S. 37 (1984). In that case, defendant Harris had challenged the constitutionality of the California punishment statute because it did not require the California appellate court to compare his sentence with sentences imposed in other similar capital cases and thereby to determine whether the sentences were proportionate. This Court stated:

> [T]he issue in this case, therefore, is whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Harris insists that it does and that this is the invariable rule in every case. Apparently, the Court of Appeals was of the same view. We do not agree.

Pulley v. Harris, 465 U.S. at 43-44. In so concluding, this Court noted that it had upheld the constitutionality of Texas capital sentencing procedures in Jurek v. Texas, 428 U.S. 262 (1976), although neither statutory nor case law provisions addressed comparative proportionality review.

Further, this Court emphasized that in Zant v. Stephens, 462 U.S. 862 (1983), it had not held:

> [T]hat without comparative proportionality review the statute would be unconstitutional. To the contrary, we relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence. Thus, the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.
>
> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold would effectively overrule Jurek and would substantially depart from the sense of Gregg and Proffitt. We are not persuaded that the Eighth Amendment requires us to take that course.

Pulley v. Harris, 465 U.S. at 50-51. The California statutory scheme requires aggravating circumstances to be weighed against

mitigating circumstances as does Oklahoma law, although the specific procedures of the two states are somewhat dissimilar. Respondent submits that under the Oklahoma statutory scheme it cannot be said that the death penalty is arbitrarily applied absent a comparative proportionality review. Pulley v. Harris, Id., at 53.

Neither is application of Okla.Stat.tit. 21, § 701.13(C) (West Supp. 1985), to Petitioner constitutionally impermissible as an ex post facto violation. In Dobbert v. Florida, 432 U.S. 282 (1977), this Court concluded that application of a Florida death penalty statute to a defendant whose crime occurred prior to the effective date of that statute did not constitute an ex post facto violation. In that case, the defendant had murdered one of his children in late December, 1971. The Florida death penalty statute in effect at that time provided that a person convicted of a capital felony was to be punished by death unless a majority of the jury recommended mercy in its verdict and the trial judge could not overrule the jury's decision. That law was later declared unconstitutional pursuant to Furman v. Georgia, 408 U.S. 238 (1972).

Late in 1972, Florida enacted a new death penalty statute which was subsequently upheld by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). Under the new statute, a separate sentencing procedure is required, whereby the defendant may present mitigating evidence; the jury makes an advisory recommendation and the trial court must make a written finding that the aggravating circumstances outweigh the mitigating circumstances in order to impose the death penalty. All death sentences are then subject to automatic appellate review. Dobbert was then tried and convicted of first degree murder under the new law and was sentenced to death by the trial judge, after overruling the jury's recommendation of a life sentence.

This Court concluded that the changes in Florida law were procedural and that application of the new statute to Dobbert did not violate the Ex Post Facto Clause of the United States Constitution. As this Court stated:



> In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty to be imposed; there was no change in the quantum of punishment attached to the crime.

Dobbert v. Florida, 432 U.S. at 293-294.

This Court discussed Beazell v. Ohio, 269 U.S. 167, 169-170 (1925), in which it had restated the characteristics of an ex post facto law:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

The revision of the Oklahoma statute in question affects only the manner in which the reviewing process will be conducted. It does not deprive the defendant of any defense available at the time the act was committed or punish as a crime an act which was not a crime when done. Neither does it make the punishment for the crime more burdensome. The situation in the case at bar is best explained by Chief Justice Burger in his concurring opinion in Dobbert:

> A crucial factor in this case, for me, is that, as the Court's opinion recites, when petitioner committed the crime, a Florida statute permits the death penalty for the offense. Petitioner was at least constructively on notice that this penalty might indeed follow his actions.

432 U.S. at 303.

This Court in Dobbert, 432 U.S. at 293, further focused its attention on Gibson v. Mississippi, 162 U.S. 565, 590 (1896), where the Supreme Court acknowledged that the inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime was committed. Statutory changes in the mode of trial which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited.

In Hopt v. Utah, 110 U.S. 574 (1884), a statute which enlarged the class of persons who may be competent to testify in criminal cases was not determined to be ex post facto, this Court noted that the statute related "to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure." Id. at 590. Even though this change in the law had a detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal an act that was previously innocent, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. Id. at 589-590.

In Petitioner's case, the change in the statute is clearly procedural. The revised statute simply alters the statutory determinations employed by the Okahoma Court of Criminal Appeals in viewing the imposition of the death penalty - there is no change in the quantity or degree of punishment attached to the crime. The crime for which Petitioner was indicted, the punishment described and the degree of proof necessary to establish his guilt, remain unaffected by the statute revision. Simply put, death was a possible penalty for first degree murder under the old law and is still, under the new act, only a possible penalty for first degree murder. The defendant would not be forced to suffer any increased punishment by the retroactive application of the new procedural change in the law. There is no ex post facto violation in applying the new law retroactively. A majority of the Oklahoma Court of Criminal Appeals concure in this interpretation. See Brewer v. State, 718 P.2d 356, 365-366, fn. 1 (Okla. Crim.App. 1986); Van Woundenberg v. State, 720 P.2d 320, 338 (Okla.Crim.App. 1986); Walker v. State, ___ P.2d ___, 57 O.B.A.J. 1939, 1948-49 (Okla.Crim.App. July 22, 1986).

Because the death penalty imposed in this action is neither cruel nor unusual punishment and because the elimination of proportionality review is purely procedural, Petitioner's constitutional rights have not been abridged.



## CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

TOMILOU GENTRY LIDDELL
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CRIMINAL DIVISION

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ATTORNEYS FOR RESPONDENT

## CERTIFICATE OF MAILING

On this 27th day of August, 1986, a true and correct copy of the foregoing was mailed, postage prepaid, to:

Thomas G. Smith, Jr.
P.O. Box 146
Purcell, OK 73080

SUSAN STEWART DICKERSON

mjj

# JOINT

# APPENDIX

Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-5309

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

BOBBY L. ROSS,

*Petitioner,*

v.

OKLAHOMA,

*Respondent.*

---

**On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma**

---

## JOINT APPENDIX

---

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**PETITION FOR CERTIORARI FILED JULY 28, 1986**
**CERTIORARI GRANTED JUNE 15, 1987**

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## RELEVANT DOCKET ENTRIES

THE DISTRICT COURT, SECOND JUDICIAL DISTRICT,
BECKHAM COUNTY, STATE OF OKLAHOMA

No. CRF-83-2

| DATE | ENTRY |
|---|---|
| 1-5-83 | Information * * * |
| 4-20-83 | Deft Ross appeared in person & by atty Joe Burch * * *. Deft Ross * * * enters a plea of not guilty * * *. |
| 7-27-83 | Motion to increase the no. of peremptory |
| 7-27-83 | Motion to life qualify the jury |
| 8-10-83 | Motion for Change of Venue |
| Deft Ross appeared in person & by atty Joe Burch8-10-83 | & St by Asst D.A. Cummings Calloway & Garrett * * *. Over 20 motions presented argued and ruled on with some concerning trial of case to be ruled on at time of trial. Deft's Motion for Change of Venue sustained and Court finds that trial would not be held in Beckham or Custer Co * * *. |
| 9-14-83 | Order Sustaining Deft. motion & Order for Removal |
| 9-14-83 | To Transfer Case to Roger Mills County |
| 9-14-83 | Receipt of Case—Court Clerk, Roger Mills Co. |

THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, ROGER MILLS COUNTY, STATE OF OKLAHOMA

No. CRF-83-27

| DATE | ENTRY |
|---|---|
| 9-14-83 | Original Case transferred from Beckham Co |
| 9-26-83 | ▲ appears in person and by Court appointed attorney, Joe Burch, & attorney Dorothy Alexander who asked to help in case and State by D.A. Garrett & asst. D.A. Cummings & Calloway; both sides announce ready for Trial. Jury Panel sworn & voir dire done individually out of hearing of other potential Jurors * * *. |
| 9-27-83 | Jury selected and sworn after others excused for cause & prempts. Information read, opening statements made by both sides and State presented 10 witnesses who were sworn & testified * * *. Jury ordered Sequestered. |
| 9-28-83 | Case continued with State's witnesses sworn & testified * * *. Jury continued being sequestered. |
| 9-29-83 | State presented Final two witnesses (second a recall) and rested. Instructions Read and final arguments presented. Case submitted at 4:15 pm & they re |
| 9-29-83 | Verdict—Count 1 |
| 9-29-83 | Verdict—Count 2 |
| 9-30-83 | Verdict of the Jury. |
| 10-17-83 | Motion of Intent to appeal * * * |
| 10-21-83 | Def. appeared in person & by attorney Joe Burch & State by D.A., Garrett & Asst. D.A.s', Cummings & Callaway * * *. Judgment & Sentence set for 99 yrs in Count 2: Robbery w/firearms and Death by lethal injection on the Murder I * * *. |



COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. F-83-780

| DATE | ENTRY |
|---|---|
| 4-23-84 | PETITION IN ERROR |
| 5-8-85 | REPORT OF TRIAL JUDGE /S/ GARY P. MCGINN |
| 4-4-86 | JE: OPINION —— AFFIRMED —— BUSSEY, J; BRETT, J; CONCURS |
| 4-28-86 | JE: ORDER—BRETT, J; BUSSEY, J; ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE. THE CLERK OF THIS COURT IS DIRECTED TO ISSUE THE MANDATE FORTHWITH. * * * |
| 6-26-86 | JE: ORDER—BRETT, J; BUSSEY, J; ORDER STAYING EXECUTION DATE. EXECUTION DATE STAYED UNTIL FURTHER ORDER OF THIS COURT. * * * |

THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
BECKHAM COUNTY,
STATE OF OKLAHOMA COURTHOUSE,
SAYRE, OKLAHOMA

---

No. CRF-83-2

---

THE STATE OF OKLAHOMA,
*Plaintiff,*
vs.
BOBBY LYNN ROSS,
*Defendant.*

---

Filed July 27, 1983

---

**MOTION TO INCREASE THE NUMBER OF PEREMPTORY CHALLENGES WHICH THE DEFENSE MAY EXERCISE**

---

Now Comes the Defendant and moves the Court to grant the Defendant additional peremptory challenges in jury selection and shows the Court as follows:

1. The Defendant is an Afro-American male and stands charged for one count of capital murder, potentially carrying the death penalty, and one count of Robbery with Firearms.
2. There has been a large amount of prejudiced publicity in this case through the local electronic and printed media.



3. That there exists widely held preconceptions within Beckham County that the Defendant is guilty of the alleged crime and that, it will be most difficult, if not impossible, for the Defendant to receive a fair trial.

The Defendant demands a hearing on this Motion.

/s/ Joe Burch
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(405) 832-5327

[Certificate of Service Omitted in Printing]

THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
BECKHAM COUNTY,
OKLAHOMA COURTHOUSE,
SAYRE, OKLAHOMA

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[Title Omitted in Printing]

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Filed July 27, 1983

---

**MOTION TO LIFE QUALIFY THE JURY**

---

COMES NOW the Defendant, Bobby Lynn Ross, and requests this court to life qualify the jury. The Defendant, upon information and belief, based on his experience in trying capital cases, believes the trial court will question the jury upon their beliefs on the death penalty. Counsel respectfully requests this court to propound the following questions to them right after they qualify the jury for the death penalty. These questions inclued:

1) Do you believe that the death penalty is ordinarily the proper punishment for the crime of Murder In the First Degree?

2) Are there any cases where you would not be in favor of the death penalty for a person who you had convicted of the crime of First Degree Murder?

3) If you sat as a juror in this case, and if the jury should happen to convict the Defendant of Murder in the First Degree, would you be able to consider voting for a sentence less than death,



believing that the Defendant was guilty of First Degree Murder?

4) If you convicted the Defendant of First Degree Murder with malice aforethought, would you presume that life imprisonment is the proper punishment until that presumption of life imprisonment were overcome, if ever, by proof beyond a reasonable doubt that the death penalty is the only appropriate penalty in this case?

5) If you heard all the evidence in this case and came to the conclusion the Defendant was guilty of Murder In the First Degree, would you have any pre-conceived notions as to what penalty should be imposed?

WHEREFORE, premises considered, Defendant respectfully requests this Court to life qualify the jury so he may get a jury of his peers.

Respectfully submitted,

/s/ Joe Burch
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[Certificate of Service Omitted in Printing]

THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
BECKHAM COUNTY,
OKLAHOMA COURTHOUSE,
SAYRE, OKLAHOMA

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[Title Omitted in Printing]

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Filed August 10, 1983

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## MOTION FOR CHANGE OF VENUE

---

COMES NOW the Defendant, Bobby Lynn Ross, in the above entitled action and moves the Court for an order changing the place of trial of this action to some other county for the following reasons, to-wit: That the Defendant believes that a fair and impartial trial of this charge cannot be had in the following counties: Beckham, Custer, Ellis and Roger Mills, and the reasons for such beliefs are as follows:

1. That due to pre-trial publicity, prospective jurors in these counties have formed a pre-determined opinion as to the Defendant's guilt.

2. That there is not available for a jury panel a selection of Black Americans which could be called to jury duty.

3. Signed Affidavits to the above position are attached for the Court's information.



4. That there have been newspaper articles which further erode the Defendant's chance of a fair trial on the above charge.

/s/ Joe Burch
JOE BURCH
Attorney for Defendant
P. O. Box 338
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(405) 832-5327

[Certificate of service omitted in printing]

THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
BECKHAM COUNTY, STATE OF OKLAHOMA

---

[Title Omitted in Printing]

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**EXCERPTS FROM TRANSCRIPT OF HEARING ON DEFENDANT'S PRETRIAL MOTIONS AUGUST 10, 1983**

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• • • •

[38] THE COURT: Probably what we will do is to save time, we will probably conduct some general voir dire in the courtroom and then as a capital case, we would certainly probably allow the attorneys and the Court to further inquire in chambers or in another room to the jurors individually. We might request the attorneys to both prepare questions that [39] they would like the Court to ask. That way the questions we decide to ask then, the jurors wouldn't feel that they were being put on the spot by either side. We will allow the attorneys to submit a list of questions that they would like the individual jurors to be asked outside of the hearing of the other jurors.

• • • •

[40] MR. BURCH: Your Honor, if it please the Court, there is another motion, a motion to life qualify the jury. I think the Court has taken care of that one in its statement right then. If that is the case then there are four or five questions that we have asked that the Court propound.



MR. CUMMINS: As a matter of fact, I believe there are two motions in that area, the motion to life qualify the jury and the motion challenging the death qualification type of voir dire questions. I think both of those would be covered by this motion.

MR. CALLAWAY: If the Court please, with reference to that list of questions to be prepared by counsel, is that a list of questions which counsel are requesting the Court to pose to the jurors?

THE COURT: Right, right. This is a list that you want the Court to ask. Then after I ask questions we will allow you the right to ask your own additional questions.

• • • •

[42] MR. CUMMINS: Your Honor, there is a motion to restrict prosecutorial strikes and a companion motion to increase the number of preemptory challenges which the defense may exercise. Those both follow the same logical pattern of legal thinking. Those matters are covered in 22 O.S. 654, which defines the preemptory challenges as one which may be taken by either party. It's an objection to a juror for which no reason need be given, but upon which the Court must excuse.

Of course, 655 says, provides the number, and it says in a prosecution for first degree murder both the State and the defense are allowed nine preemptory challenges.

The Court has held, the Oklahoma Court of Criminal Appeals, in Prichard versus State, 539 P. 2d 392, that the [43] trial court was without authority to increase the number of of defendant's preemptory challenges, even though the defendant claimed that increase was necessary in order to obtain an impartial jury.

That, I think, takes care of the defendant's motion to increase preemptories, and following that chain of thought would also take care of the question of limiting the State's. The statute says how many and the

Court says the statute shall be obeyed. I would move both of those be overruled.

THE COURT: Anything else on those?

MR. BURCH: No, Your Honor.

• • • •

[45] THE COURT: We will allow that part to be stricken, and of course, the motion is overruled. That motion, plus the motion to increase the number of pre-empts for the defendant.

• • • •



THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT
BECKHAM COUNTY,
STATE OF OKLAHOMA COURTHOUSE,
SAYRE, OKLAHOMA

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[Title Omitted in Printing]

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Filed September 14, 1983

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**ORDER SUSTAINING DEFENDANT'S MOTION FOR CHANGE OF VENUE AND ORDER OF REMOVAL**

---

On August 31, 1983, at 9:30 a.m. at a hearing with James P. Garrett, District Attorney, David Cummins, Assistant District Attorney and Charles C. Callaway, Assistant District Attorney appearing for the State and defendant present in person and by his attorney. The defendant presented his written Motion for a Change of Venue and offered affidavits of responsible citizens of Beckham County and all of the records and files in the case and the extensive newspaper press reports relative to this case and the District Attorney been given the opportunity to have time to obtain counter affidavits and evidence in opposition announced that he did not want further time and offered no affidavits or evidence. The Court concluded from the evidence offered that the defendants Motion must, under the law, be sustained and trial and subsequent proceedings in the case changed to another county in the Second Judicial District. The

Court determined that the matter of where the venue should be changed to should be taken under advisement until the Court could check the dockets and determine a suitable court where a fair trial could be had.

IT IS THEREFORE ORDERED:

1. That the defendant's Motion for Change of Venue is sustained.
2. That this case should be removed to Roger Mills County to be tried in the District Court of Roger Mills County.
3. That the clerk must make out and within ten (10) days transmit to the Court Clerk of that county a certified copy of this Order of Removal and the records shall be transmitted including the undertaking for the appearance of the defendant, if any, and of the witnesses, if any, and upon receipt of the Court Clerk Roger Mills County the case shall be docketed and stand for trial within six (6) months from August 31, 1983, as may be set by Order of the Court, and trial date is hereby set for Jury Trial on Monday, September 26, 1983, and thereafter as may be required.
4. That the expense and cost of this case shall be handled as provided by 22 OS 1971 Section 562 and the clerks of Beckham and Roger Mills County are directed to take action to see that the costs are so handled.

/s/ Gary P. McGinn
Judge of the District Court



THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
ROGER MILLS COUNTY, STATE OF OKLAHOMA

---

No. CRF-83-27

THE STATE OF OKLAHOMA,
*Plaintiff,*

vs.

BOBBY LYNN ROSS,
*Defendant.*

---

**EXCERPTS FROM TRANSCRIPT OF VOIR DIRE**
**SEPTEMBER 26, 1983**

---

* * * *

[378] THE COURT: Mr. Collins, you will be excused from this particular case. We do have some other cases in December, December 13, at 9:30. You will be excused until then.

The clerk will draw another juror.

MR. CAMPBELL: Darrell Huling.

THE COURT: Okay, Mr. Huling, if you will take the end seat on the back row.

* * * *

[379] Q Okay. Have you heard of this case before you reported for jury service today?

A Yes.

Q Had you read about it?

A No. No, I hadn't read about it.

Q What information—

A Just news on the radio.

[380] Q Okay. You heard some news report. Had you discussed this case with anyone?

A No.

* * * *

[382] Q One of the charges the defendant is charged with is murder in the first degree. In Oklahoma a person convicted of murder in the first degree shall be punished by death or by imprisonment for life. Now, it's the duty of the jury to determine whether the defendant is guilty or not guilty of murder in the first degree. If the jury finds the defendant is guilty of the crime of murder in the first degree it's then the jury's duty to determine whether or not, considering the evidence, they should recommend death.

Now, the question is if selected as a juror in this case, and the law and the evidence would warrant, could you without doing violence to your conscience recommend the death penalty?

A Yes.

* * * *

[383] THE COURT: We will allow Mr. Cummins to inquire further for cause.

* * * *

[384] Q How do you feel about the death penalty just as a general philosophical question, Mr. Huling?

A I think it should be.

Q You agree that it should be a part of the law; is that correct?

A Yes.

Q Now, when you get into this case it gets a little more personal. You understand the burden is on the State of Oklahoma to convince you, to satisfy you beyond a reasonable doubt that Bobby Lynn Ross committed the crime of armed robbery. If we do that can you come into the courtroom here and tell the Court and tell that defendant that you find him guilty of that?

A Yes.



Q According to the law that carries a penalty of not less than five years in the pen. Could you recommend a sentence, a term in the penitentiary according to law?

A Yes.

Q Then could you weigh the evidence and if you're convinced, if you're satisfied, if you believe beyond a reasonable doubt that Bobby Lynn Ross murdered Steven Leroy Mahan [385] could come back in this courtroom and say, "Yes, we find you guilty?"

A Yes.

Q Then there is one more step, Mr. Huling. That's the one where the law says the punishment for murder in the first degree is life in the penitentiary or death. Are you able to choose between them?

A Yes.

Q If you felt the circumstances appropriate could you recommend a sentence of life in the penitentiary?

A Yes.

Q If you felt the circumstances appropriate, because of the type of crime, because of something in the law or evidence that you found aggravating, could you recommend a sentence of death?

A Yes.

* * * *

[386] THE COURT: Mr. Burch, you can inquire further for cause.

* * * *

[388] Q Mr. Huling, let me ask you a question about —let's talk about a minute if you sit on this jury and you listen to all of the evidence in the case, all of the sworn testimony and the physical evidence that may be introduced by the State or by Bobby Ross, and you listen to what the Judge tells you that the law is in the case and the things you could consider by law and you go out in the jury room to deliberate to determine whether or not Bobby is guilty or innocent, and let's assume for a moment that you go out there and there is a reason-

able doubt in your mind that he was guilty. What would you vote for?

A How would I vote if he was—

Q Now, if there is a reasonable doubt in your mind that he [389] is guilty—maybe I didn't make myself clear. If you have a reasonable doubt that the State has not proved their case, that this man may not be guilty, then how would you vote?

A I would vote he was innocent.

Q What if all eleven other people said he was guilty.

A I would say he's innocent.

Q And you would say that from now on?

A If I thought he was.

Q Would you promise me you would do that if that's your feeling?

A Yeah.

Q Let's take it one more step further if you would, Mr. Huling. Let's assume you're sitting on this jury and the jury convicts Bobby of murder in the first degree and the Judge tells you what the law is in the State of Oklahoma concerning the possibility of a life imprisonment or a death sentence, would you promise me that you could look at both of them, at both alternatives?

A Yes.

Q Just because you found him guilty you wouldn't necessarily give him the death penalty, would you?

A Yes.

Q Oh, you would? If you found him guilty then in your own mind you would give him the death penalty?

A Yes.

[390] Q You wouldn't consider anything else?

A No.

Q Once again, Mr. Huling, and please bear with me a minute. Sometimes I ask these questions and I'm not trying to be nosy or anything else. I just want to know some of your feelings. If you have any questions you ask me, please. Let's go back to you sitting on the jury.



Right now do you have any notion in your mind whether or not Bobby is guilty?

A I have no idea.

Q If you had to vote right now how would you vote?

A I wouldn't.

MR. BURCH: Your Honor, we're going to challenge this juror for cause. Even though he has not expressed a preconceived notion of innocence or guilt, Mr. Huling has testified that he would not be able to follow the law handed down by the Court in the sentencing phase in the event of a guilty verdict. He has testified in the event of a guilty verdict that he would automatically vote for a death penalty, and we feel that is not a fair and impartial juror. Mr. Huling has admitted that he could not follow the Court's instructions on the law and consider life imprisonment in the punishment phase.

THE COURT: Overruled. Exceptions allowed.

MR. BURCH: No further questions.

THE COURT: Mr. Huling, you can go to the jury [391] room at this time.

We will recognize—don't discuss the case. We will recognize the State for their sixth preempt.

MR. CUMMINS: State will waive their sixth preemptory, Your Honor.

THE COURT: We will recognize the defendant.

MR. BURCH: Your Honor, please call Mr. Huling back. We excuse him.

THE COURT: If you will call Mr. Huling, then.

(Thereupon, Mr. Huling enters the courtroom.)

THE COURT: Mr. Huling, you will be excused from this particular case. We have some other cases in December. If you will report here on December 13. That's on a Tuesday morning at 9:30.

(Thereupon, all prospective jurors are brought to the courtroom, and the following proceedings are had:)

THE COURT: Ladies and gentlemen, reporting for jury service, I want to tell you I know it's been a long day and I know sitting out in the hall you wondered why things were taking so long, but I do want to assure you that we have been working in here. We haven't selected a jury yet in this case.

We will just go ahead and recess for the night, and if you all will report back in the morning at 9:30. Those that have been sent to the jury room, if you will just report back [392] there at 9:30, and the others just come up and stay outside of the courtroom. We will continue with selecting this jury then.

As you all are aware this is a real serious case, and we would ask that you not discuss this case with your family or friends or let anybody discuss the case with you at this time.

We will excuse you until 9:30 in the morning.

(Thereupon, the proceedings are recessed to September 27, 1983, at 9:30 a.m., after which time the following proceedings are had:)



THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
ROGER MILLS COUNTY, STATE OF OKLAHOMA

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[Title Omitted in Printing]

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**EXCERPTS FROM TRANSCRIPT OF VOIR DIRE**
**SEPTEMBER 27, 1983**

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• • • •

[425] THE COURT: Mrs. Blount, you will be excused from this particular case. We do have some other cases on December 13, so you will be excused until then.

We will have the clerk draw another juror.

MR. CAMPBELL: Terrell Scroggins.

THE COURT: Mr. Scroggins, if you will take the seat, the second on the top row from this end.

• • • •

[426] Q Okay. Pre-School. Mr. Scroggins, have you heard about this case that we're selecting a jury for today, the State of Oklahoma versus Bobby Lynn Ross, before you came to court yesterday morning?

A Some, just a little bit.

Q Had you read reports or heard something?

A No, I hadn't read anything on it.

Q What informatino did you have?

A Well, I just heard that there had been a police officer killed.

Q Had you heard anybody express any opinions?

A I've heard people express opinions.

• • • •

[435] THE COURT: Mr. Burch, you can inquire further.

• • • •

[437] Q Let's assume a moment that the testimony and the evidence and the facts and the Judge's instructions as to the law would give you the opportunity to consider life imprisonment or a death penalty after the trial. Would you consider both of them?

A Yes.

Q And put another way, in the event of a guilty verdict would you automatically vote for the death penalty?

A I don't—right now I don't believe I would. I don't know.

Q Do you believe in the death penalty?

A Yes, sir.

Q Why?

A I don't believe it's right to take another person's life.

Q Could you conceive of a particular situation where life [438] imprisonment may be a worse punishment than the death penalty for some people?

A I suppose it could.

Q Mr. Scroggins, assume for a moment again, please, sir, that the evidence may show that Bobby Ross was under the influence of drugs or alcohol when this alleged incident took place. Do you think that that fact, if that would be presented to you, would be a mitigating circumstance concerning whether or not he had the mental intent to commit a murder? Put another way would that make any difference as to his punishment?

A In other words, would that be an excuse not for the death penalty?

Q Yes, you can say that.

A I don't believe so.

Q Would it make any difference as to whether or not you found the defendant guilty?

A If they were on drugs?



Q Drugs or alcohol.

A I don't believe so.

MR. BURCH: No further questions, Judge.

THE COURT: Pass for cause?

MR. BURCH: Yes.

THE COURT: Mr. Scroggins, we would ask that you go in the jury room at this time and don't discuss this case.

• • • •

[439] THE COURT: Mr. Bottom, you would be excused from this particular case. We do have some other cases December 13. That's on a Tuesday, at 9:30. You will report for jury service then. Thank you, sir.

We will have the clerk draw another juror.

[440] MR. CAMPBELL: Lonnie Jenks.

THE COURT: Mr. Jenks, if you will take the third seat in the front row from that end.

• • • •

Q Mr. Jenks, had you heard about the case, the State of Oklahoma versus Bobby Lynn Ross, before you reported for jury service yesterday morning?

A Yes, sir, I have.

Q And what—

A The only thing I've heard, sir, is that the suspect was in custody.

• • • •

[443] Q Have you ever been connected with law enforcement?

A Yes, sir. I was on the police force here in Cheyenne about two years ago.

Q How long a period of time was that?

A I was employed for six months, sir.

Q Did you take any training?

A Yes, sir, I did, at Alva at the police academy.

• • • •

[452] THE COURT: Mr. Burch, you can inquire further for cause.

• • • •

[456] Q Do you have any friends on the police force?
A Yes, sir. The undersheriff and the Sheriff both.
Q Do you visit with them socially at coffee shops and stuff?
A Socially, yes, sir.

• • • •

[457] MR. BURCH: Pass for cause.
THE COURT: You can take a seat in the jury room and we ask that you not discuss this case with anyone.
The State's ninth.
MR. CUMMINS: We will waive it.
THE COURT: The State waives their ninth. The defendant's ninth preemptory challenge.
MR. BURCH: Call Mr. Jenks back, or excuse Mr. Jenks.

(Thereupon, Mr. Jenks enters the courtroom.)

THE COURT: Mr. Jenks, you will be excused from this particular case. We have some other cases December 13, that's Tuesday, at 9:30 if you will report for jury service at that time.
We will have the clerk draw another juror.
MR. CAMPBELL: Leldon Vernon Harrison.
THE COURT: Mr. Harrison, if you will take the third seat on the front row from that end.

• • • •

[459] Q Mr. Harrison, had you heard about this case that we're selecting a jury for today, the State of Oklahoma versus Bobby Lynn Ross, before you came to court yesterday morning?
A Just what I read in the newspaper back sometime ago.



Q You read that an incident happened. Did you remember any of the facts that they reported or stated?
A No, not particularly.
Q Did you remember even the name Bobby Lynn Ross?
A No, sir, I didn't.

• • • •

[463] THE COURT: We will allow Mr. Cummins to inquire further for cause.

• • • •

[473] MR. CUMMINS: We pass this juror for cause.
THE COURT: Okay, Mr. Burch, you can inquire further.

• • • •

[475] MR. BURCH: We pass for cause.
THE COURT: Mr. Harrison, you can go back into the jury room. Don't discuss the case at this time with anyone.
I think we'll take a short five-minute recess.

(Thereupon, a recess is taken, after which time the following proceedings are had:)

THE COURT: Let the record show that both sides have used the ninth preemptory challenge. Anything for the record for the defendant?
MR. BURCH: Comes now the Defendant Bobby Lynn Ross and objects to the composition of the twelve people, in that there were no black people called as jurymen in this case and the defendant feels he's denied a fair and impartial trial by his peers. We move that the entire jury panel be quashed.
THE COURT: That would be overruled with exceptions allowed the defendant.

• • • •

THE DISTRICT COURT,
ROGER MILLS COUNTY, STATE OF OKLAHOMA

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[Title Omitted in Printing]

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Filed February 12, 1985 in the District Court
Filed May 8, 1985 in the Court of Criminal
Appeals of Oklahoma

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**CAPITAL FELONY: REPORT OF THE TRIAL JUDGE**

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A. *Data Concerning the Defendant*

1. Name: Ross, Bobby Lynn
2. Date of Birth: 3-8-58
3. Social Security Number: 442 58 4668
4. Sex: Male
5. Marital Status: Married (Common Law)
6. Children: Two children, aged three and four
7. Defendant's father and mother are living.
8. There were eight children born to the parents.
9. The ninth grade was the highest grade completed.
10. Defendant's intelligence level is medium with IQ of 75.
11. A psychiatric evaluation was performed.
    a. Defendant is able to distinguish right from wrong.



    b. Defendant is not able to adhere to the right.
    c. Defendant is able to cooperate intelligently in his own defense.
12. Character and behavior disorders found in the psychiatric evaluation indicate that the defendant feels alienated and remote from his environment and misunderstood by society. Test results further indicate that he is presently in a state of turmoil, high stress, increased tension and anxiety. He is bothered by moral anxiety and guilt feelings generated by his past experiences and present situation. The test results further indicate Mr. Ross is immature, aloof, self-absorbed and detached from his environment. He experiences deficiencies in his capacity to establish and maintain lasting social relationships.
13. The results of the psychological evaluation indicate that Mr. Ross is not psychotic and is cognizant of his current presentence status. The defendant is presently competent in distinguishing between right and wrong.
14. Prior work record of Defendant:

| | Type Job | Dates Held | Pay | Reason for Termination |
|---|---|---|---|---|
| a. | Paid Assassin and Armed Robber | Unknown | Variable | Arrested |
| b. | House Painter | 10-82 | $4.00 hr. | Unknown |
| c. | Maintenance Work | 6-6-82 to 7-1-82 | Unknown | Excessive absences |
| d. | Construction Work | 2-82 to 3-82 | $8.30 hr. | Disagreement with foreman |
| e. | Car Wash | '80 thru '81 | $3.30 hr. | Business sold |

B. *Data Concerning the Trial*

1. The case was tried with a jury.
2. The defendant pled not guilty.

C. *Offense Related Data*

1. Murder in the first degree for which penalty was imposed were:
   a. With malice aforethought causing the death of another human being.
   b. Took the life of another during robbery with a dangerous weapon.
2. The offense of robbery with firearms was tried in the same trial.
3. The jury recommended the death sentence.
4. Statutory aggravating circumstances were found.
5. The following statutory aggravating circumstances were instructed and were found:
   a. The defendant knowingly created a great risk of death to more than one person.
   b. The murder was especially heinous, atrocious, or cruel.
   c. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.
   d. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.
   e. The victim was a law enforcement officer in the performance of his duties.
6. There were no non-statutory aggravating circumstances indicated by the evidence.
7. There was evidence of mitigating circumstances.
8. The following mitigating circumstances were in evidence:
   a. The defendant had been drinking.



   b. The defendant has been baptized and has made tapes to help in the ministry of youth.
9. The jury was instructed to consider the circumstances indicated in 8 as mitigating circumstances.
10. The defendant's physical or mental condition do not call for special consideration.
11. The evidence suffices to sustain the verdict and it forecloses all doubt respecting the defendant's guilt.
12. The victim was not related by blood or marriage to the defendant.
13. The victim was not an employer or employee of the defendant.
14. The victim was not acquainted with the defendant.
15. The victim was a local resident in the community.
16. The victim was not the same race as the defendant.
17. The victim was the same sex as the defendant.
18. The victim was not held hostage during the crime.
19. The victim's reputation in the community was good.
20. The victim was physically harmed or tortured by being shot three times at close range in the head and dying enroute to an Oklahoma City hospital.
21. The victim was thirty years of age, being born on May 23, 1952.
22. A firearm was used in the commission of the crime.

23. The defendant has a record of prior convictions as follows:

| | Offense | Date of Offense | Sentence Imposed |
|---|---|---|---|
| a. | Possession of Marijuana | 1978 | Jail 7 days and $140 fine |
| b. | Indecency with Child | 7-29-80 | 5 year suspended sentence |

24. There was evidence the defendant had been drinking alcohol the night of the offense.

25. The defendant was transient in the community.

D. *Representation of Defendant*

1. Counsel was secured on or about January 14, 1983.
2. Counsel was retained by defendant's brother.
3. The same counsel was subsequently appointed by the Court as defendant was unable to afford counsel.
4. Counsel has practiced law for four years.
5. Counsel's practice is 50 percent criminal and 50 percent civil.
6. The same counsel served throughout the trial. In addition, counsel had Dorothy Alexander, an attorney and resident of the county in which the case was tried, assist in the selection of the jury and during the trial only.

E. *General Considerations*

1. Race was not raised by the defense as an issue in the trial.
2. Race did otherwise appear as an issue in the trial.
3. Under 10 percent of the population of the county is the same race as the defendant.
4. No members of defendant's race were represented on the jury.



5. There was no evidence they were systematically excluded from the jury.
6. The jury was not instructed to exclude race as an issue.
7. There was extensive publicity in the community concerning this case.
8. The jury was instructed to disregard such publicity.
9. The jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence.
10. There was no evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence.
11. The jury was well-educated, very conscientious, and paid close attention to all evidence presented. The death sentence was not surprising considering the overwhelming evidence presented.

F. *Chronology of Case*

| | Elapsed Days |
|---|---|
| 1. Date of Offense: January 5, 1983 | |
| 2. Date of Arrest: January 5, 1983 | 0 |
| 3. Date Trial Began: September 26, 1983 | 261 |
| 4. Date Sentence Imposed: October 21, 1983 | 286 |
| 5. Date Post-Trial Motions ruled on: October 26, 1983 | 286 |
| 6. Date Trial Judge's Report Completed: October 26, 1983 | 291 |
| 7. Date Received by Court of Criminal Appeals: | |
| 8. Date Sentence Review Completed: | |
| 9. Total Elapsed Days: _____ | |

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and he assisted in the

preparation of certain portions of the report and had no further comments.

Oct. 26, 1983
Date

/s/ Gary P. McGinn
Judge, District Court of
Roger Mills County

[Certificate Omitted in Printing]



IN THE COURT OF CRIMINAL APPEALS
OF OKLAHOMA

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No. F-83-780

BOBBY LYNN ROSS,
*Appellant,*

vs.

STATE OF OKLAHOMA,
*Appellee.*

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Filed April 4, 1986

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**OPINION**

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BUSSEY, Judge:

The appellant, Bobby Lynn Ross, was convicted in the District Court of Roger Mills County, Case No. CRF-83-27, after a change of venue had been granted from Beckham County, Case No. CRF-83-2, of Murder in the First Degree, and Robbery with a Firearm, for which he received sentences of death, and ninety years' imprisonment, respectively. From these judgments and sentences, he appeals.

The facts are that about 1:50 a.m. on January 5, 1983, the night clerk at the Los Cuartos Inn located in Elk City, Oklahoma was robbed by two black men, one of whom was later identified as being the appellant. After the first man left, and before the appellant could leave, a police officer, Sargeant Steven Mahan, pulled up in

his vehicle on a routine check and was shot three times in the head by the appellant. Officer Mahan was pronounced dead about three and a half hours later at El Reno Hospital. The vehicle in which the appellant and two other men were riding was stopped at the intersection of Interstate 40 and Highway 83 south of Clinton about twenty-five minutes after the shooting by two Clinton police officers who observed that that vehicle had an unsafe windshield and a defective taillight. The suspects were subsequently arrested.

As the first assignment of error, the appellant alleges that his initial arrest was predicated on an unwarranted stop and frisk and that therefore the evidence secured as a result of that arrest should be excluded. The facts show that about 2:22 a.m. the police dispatcher at the Elk City Police Department broadcasted the description of the two suspects of the Los Cuartos Inn robbery, including race, height, and clothing of each of the suspects, one dressed in gray, the other in black. The information was received by the Clinton Police Department, and as a result, Officers Lumpkin and Dover positioned their vehicle on Highway 183 overpass above Interstate 40. About 2:26 a.m. they observed a vehicle with a broken taillight and a cracked windshield come from the west on I-40 and turn north onto Highway 183. The officers stopped the vehicle.

The first issue is whether or not the stop of the vehicle was lawful. Title 47 O.S.1981, § 12-101 provides that the operation of an unsafe vehicle on any highway is a misdemeanor. The statutes further provide that a peace officer may, without a warrant, arrest a person for a public offense committed in his presence [22 O.S.Supp. 1985, § 196(1)]. Observation by Officer Lumpkin of a vehicle being operated on a state highway with a defective taillight and unsafe windshield certainly justified the stop of the vehicle.

The second issue is whether or not the officers could lawfully frisk the appellant. Officer Lumpkin stated



that he recognized the driver and the passenger in the back seat, both of whom he knew to have carried firearms in the past. This circumstance, together with the facts that the driver behaved suspiciously, by placing his hands on the hood in the position for a frisk search without being instructed to do so, two of the men fit the description of the Elk City robbery suspects, and arrived in Clinton within the time it would take to drive from Elk City, leads to the conclusion that the officers reasonably inferred from specific and articulable facts that the intrusion (the frisking of the three occupants of the vehicle) was justified. *See Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The third issue is whether or not the pistol seized from the appellant was properly admitted in his prosecution. We conclude that it was. At the time the weapon was seized, Officer Lumpkin had reasonable grounds to believe that the appellant was armed and dangerous, and it was necessary "to take swift measures to discover the true facts and neutralize the threat of harm if it materialized." *Terry*, 392 U.S. at 30.

The final issue is whether or not the confession was the fruit of an illegal arrest and therefore should have been excluded on those grounds. As we have found that the search was legal, we find that the arrest was also legal as it followed the discovery of a concealed weapon, which act is unlawful. (21 O.S. 1981, § 1289.8). The confession which followed cannot be said to be the fruit of an illegal arrest.

We therefore conclude that this assignment of error is without merit.

As his second asssignment of error, the appellant complains that the trial court improperly excluded three jurors in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), who had reservations concerning the death penalty and failed to exclude a juror who would automatically vote for the death penalty if the appellant was found guilty.

Upon the issue of excluding jurors, the rule is clear that a prospective juror who is irrevocably committed, prior to trial, to vote against the death penalty may be properly excluded. *Dutton* v. *State*, 674 P.2d 1134 (Okl. Cr. 1984). Prospective juror Webb was asked if she felt there were no circumstances under which the death penalty would be allowed, and she answered "That's correct." Prospective juror Stacher was asked by defense counsel if it was a fair statement that under no circumstances would she ever give the death penalty, and she responded, "That is a fair statement." Prospective juror Sanve was asked if in a case where the law and evidence warranted, he could without doing violence to his conscience, recommend the death penalty, and he stated, "I couldn't." Almost an identical question was asked in *Koonce* v. *State*, 456 P.2d 549, 555 (Okl.Cr. 1969), *modified*, 408 U.S. 934, 92 S.Ct. 2845, 33 L.Ed.2d 748 (1972), of a prospective juror as that asked Sanve, and we found that the jury was correctly selected. The questioning of these three jurors reveals that they could not have agreed in a proper case to even consider a verdict imposing the death penalty, and therefore this contention is without merit. *See Wainwright* v. *Witt*, 469 U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

Upon the issue of failure to exclude a juror who would automatically vote for the death penalty, the facts show that one prospective juror stated twice that he would automatically vote for the death penalty if he found the defendant guilty of murder. Once a defendant has been found guilty, the duty of the jurors is to hear and determine evidence in aggravation and in mitigation, and to consider whether the evidence in aggravation outweighs the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances. 21 O.S. 1981, § 701.11. The failure of the trial court to remove a prospective juror who unequivocally states that he is unwilling to follow the law during the penalty phase by considering a life sentence



is error. *See Stroud* v. *United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), *reh. denied*, 251 U.S. 380, 40 S.Ct. 176, 64 L.Ed. 317 (1920). *See also Alvord* v. *Wainwright*, 564 F.Supp. 459 (1983), *aff'd in part, rev'd in part*, 725 F.2d 1282 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 355, 83 L.Ed.2d 291 (1985). The record reflects that defense counsel challenged the prospective juror for cause, and when the court denied the challenge, defense counsel used a peremptory challenge. All of appellant's peremptory challenges were subsequently used; but as there is nothing in the record to show that any juror who sat on the trial was objectionable, we are unable to discover any grounds for reversal. *See Stroud* and *Ferrell* v. *State*, 475 P.2d 825 (Okl.Cr.1980). We therefore find this assignment of error to be without merit.

As his next assignment of error, the appellant cites two instances during the trial in which evidence of other crimes was injected and complains that these instances interfered with his right to a fair and impartial trial. In the first instance, Undersheriff Jameson testified that Mike Snow's part in the taped interrogation was on the subject of prior felony convictions. The trial court sustained an objection to that line of questions, but no request that the jury be admonished was made, so this issue is not properly perserved for appellate review. *See Hickman* v. *State*, 626 P.2d 873 (Okl.Cr.1981). In the second instance, during the playing of the recorded confession of the appellant in the jury's presence, the interrogating officer inquired concerning a rape charge which the appellant corrected as an "indecency of a child." After the tape concluded, defense counsel requested that the jury be admonished, but the court stated that a written instruction would be submitted to the jury on that subject. The appellant complains that the instruction allowed the jury to consider evidence on the issue of intent, knowledge or identity when the State had filed no notice under *Burks* v. *State*, 594 P.2d 771

(Okl.Cr.1979). But there was no objection to the instruction. Furthermore, the appellant's requested instruction was identical except it would have allowed the jury to consider the evidence on the issue of motive, intent and plan. As there is no significant difference between the two institutions, and the limiting instruction concerning other crimes evidence was properly given, the appellant has not been prejudiced, especially when the evidence of guilt was so overwhelming.

Appellant next urges that the evidence was insufficient to support his conviction for robbery with a dangerous weapon, and the trial court erred in failing to instruct on first degree robbery. The facts show that appellant's accomplice poked Ms. Sandefur in the back with what he said was a gun, and then threatened to shoot her if she did not cooperate. She further observed that his hand was outside his jacket, wrapped around something which caused the pocket of the jacket to protrude, and that object was sticking her in the back. Later, while leaving the motel, appellant shot to death a police officer and was found in possession of that same gun when arrested. Another gun was also found in the car. Where there is evidence, although circumstantial, to support the jury's verdict, it will not be disturbed by this Court. *Fields* v. *State*, 666 P.2d 1301 (Okl.Cr.1983). The facts before us are more than sufficient for an inference that appellant and his accomplice were armed with firearms during the robbery, and so we find this contention to be meritless.

We further find that the trial court did not err in failing to instruct on first degree robbery. An instruction concerning an included offense is not necessary when the facts do not justify it. *Jefferson* v. *State*, 675 P.2d 443 (Okl.Cr.1984). We must also note that we have no record of an objection in the omission of the instruction, nor did the appellant's attorney submit a requested instruction on first degree robbery, even though he submitted thirty-six requested instructions. Where an appellant fails to interpose an objection to the court's instructions, or to submit instructions designed to correct any improprieties or inadequacies in the court's instructions, any errors in those instructions are viewed. *Jetton* v. *State*, 632 P.2d 432 (Okl.Cr.1981). We therefore find this assignment of error to be without merit.



Similarly, the appellant argues that the trial court committed reversible error by refusing to give appellant's requested instructions on second degree felony murder and first degree manslaughter. Second degree felony murder is not a lesser included offense of premeditated murder, which was the offense charged, and we have found that the trial court did not err in failing to instruct on first degree robbery, which is the underlying felony to support second degree felony murder. Therefore, an instruction on second degree felony murder would have been improper. Concerning the manslaughter instruction, the facts show that the appellant shot Officer Mahan three times in the head; two of the wounds were made at close range. Appellant admits that the officer did what he was ordered to do, but appellant shot him anyway. As support for the instruction, appellant points to the portion of his statement in which he asserted that he merely wished to wound the officer so that he could not get up and shoot one of the robbers. The issue is whether or not this statement, together with his expressions of regret after the incident, is enough to support a first degree manslaughter instruction. These self-serving statements alone are not sufficient to require the trial court to give the appellant's instruction. *See Lumpkin* v. *State*, 683 P.2d 985 (Okl.Cr.1984).

As his next assignment of error the appellant alleges that the trial court failed to compel compliance with the State's offer of a negotiated plea and to allow the appellant to offer evidence of the negotiated plea in mitigation during the second stage proceedings. The facts show that an agreement had been made between one of

the prosecutors and defense counsel for the appellant to plead guilty in exchange for two life sentences. The offer was later withdrawn and the appellant filed a motion to compel compliance with the agreement, which was denied. There is no absolute right to have a guilty plea accepted, nor even a constitutional right to plea bargaining. *See Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) and *Gray* v. *State*, 650 P.2d 880 (Okl.Cr.1982). Furthermore, appellant does not allege that he was prejudiced by the withdrawal of the offer. Therefore, this assignment of error is meritless.

Appellant also alleges that he should have been allowed to offer evidence of the negotiated plea agreement as a mitigating circumstance. The trial court properly refused to allow the evidence to be presented. Allowing a defendant to use plea negotiations in mitigation would clearly discourage plea negotiations in capital cases as prosecutors would correctly fear that during the second stage proceedings, they would be arguing against themselves. Plea bargaining is to be encouraged, not discouraged (*See Santobello*), and therefore is improper evidence to present in mitigation.

We next turn to the appellant's allegation that the trial court committed error in failing to sustain a motion made prior to the second stage of trial, which sought to prohibit the prosecutor from questioning the appellant concerning a Texas homicide for which the appellant had neither been tried nor convicted. As this ruling preceded the second stage of trial, it is analogous to a motion in limine, which is merely advisory. *Nealy* v. *State*, 636 P.2d 378 (Okl.Cr.1981). To properly preserve such an error for review the appellant should have made an offer of proof at the proper point during the trial in order to reveal the substance of the evidence which he desired to present. Without such offer, we cannot determine if the alleged error has adversely affected a substantial right of the appellant. *See* 12 O.S. 1981, § 2104. *See also Nealy*.



The appellant argues in another assignment of error that the State failed to provide him with complete notice of the aggravating circumstances, and the supporting evidence it intended to use.

First, he complains that the Bill of Particulars failed to comply with 21 O.S.1981, § 701.10 which requires that evidence in aggravation be made known to the defendant prior to trial. He alleges that there was no clear reference to the aggravating circumstance that the victim of the murder was a police officer. An examination of the Bill of Particulars reveals that paragraph four clearly states that the victim was "a uniformed acting officer of the Elk City, Oklahoma, Police Department, . . . killed while in the performance of his official duties." We find that this complies with the statute.

Second, he compains that the State failed to give adequate notice of the evidence it intended to use to support the aggravating circumstance of being a threat to society. The record reveals that the prosecution stated its intentions, in the Bill of Particulars, to show that the appellant was charged with murder in Texas, and that Bobby Johnson, a co-defendant who had pled guilty in that case, would be called as a witness. As the purpose of 21 O.S. 1981, § 701.10 is to allow the accused an opportunity to prepare a defense, we find that the notice given was sufficient. *See Jones* v. *State*, 660 P.2d 634 (Okl.Cr. 1983).

Next, the appellant alleges that the evidence presented was insufficient to support the aggravating circumstances.

First, the appellant contends that the evidence was insufficient to support the aggravating circumstance that he knowingly created a great risk of death to more than one person [21 O.S.1981, § 701.12(2)] because there was no evidence that he pointed a gun at anyone other than Officer Mahan. Although this aggravating circumstance

is normally applied to situations where several people are killed or wounded, this Court has found that the evidence supported the aggravating circumstance when a defendant pointed a revolver at a group of teenagers who were verbally taunting him. *Hays* v. *State*, 617 P.2d 223 (Okl.Cr.1980). The appellant threatened the motel clerk with death if she did not cooperate. His shooting of the police officer showed his willingness to act on the threat, and she was in the immediate area when Officer Mahan was shot. The Supreme Court of the United States has upheld two Florida death sentences under a statute similar to 21 O.S.1981, § 701.12 (2). *Proffitt* v. *Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), *reh. denied*, 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 158 (1976), and *Barclay* v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). We find that the facts support this aggravating circumstance.

Second, the appellant argues that the evidence was also insufficient to support the aggravating circumstance that the homicide was especially heinous, atrocious, or cruel [21 O.S.1981, § 701.12(4)] because there was no evidence of physical abuse or torture, or that the victim suffered "an inordinate amount of pain." In *Eddings* v. *State*, 616 P.2d 1159 (Okl.Cr.1980), *rev'd on other grounds*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), *modified*, 688 P.2d 342 (Okl.Cr.1984), this Court held that the fact that the victim was a police officer rendered the crime especially heinous, atrocious or cruel where a highway patrolman was killed by a shotgun blast as he approached a vehicle he had stopped for a traffic violation. We stated that the identity of the victim and the manner in which the killing was done made his murder especially abhorrent as the officer was not expecting danger. In the case before us, an officer was making a routine stop to check on a hotel clerk, and when suddenly confronted by the appellant, obeyed each command,



but was shot anyway at close range. Given the circumstances and the manner of killing, we find the evidence supports this aggravating circumstance. *See also Nuckols* v. *State*, 690 P.2d 463 (Okl.Cr.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985) and *Cartwright* v. *State*, 695 P.2d 548 (Okl.Cr.1985), *cert. denied*, —— U.S. ——, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985), for discussion of the consideration to be given the manner of killing in determining whether a murder is heinous, atrocious, or cruel.

Third, the appellant urges that the evidence was insufficient to support the aggravating circumstance that he constituted a continuing threat to society [21 O.S. 1981, § 701.12(7)] because he alleges that the only evidence presented to support it was the uncorroborated testimony of an alleged accomplice to a Texas murder. Prior to trial, the State gave notice in a Bill of Particulars in conformance with 21 O.S.1981, § 701.10, that in support of the aggravating circumstance it would present evidence that the appellant was charged with the offense of Capital Murder in Texas. During the second stage hearing the State called Bobby Dean Johnson who testified that he and the appellant committed a murder for hire in Texas. No further evidence was presented corroborating Johnson's testimony. The State also incorporated the evidence from the first stage into the second stage. That evidence included details of the victim's death from the medical examiner's testimony, the evidence of the armed robbery and the details of the murder itself. Details of the crimes for which a defendant is being tried can be evidence of this aggravating circumstance. In *Robison* v. *State*, 677 P.2d 1080 (Okl.Cr. 1984), *cert. denied*, —— U.S. ——, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984), this Court held:

> [T]he calloused manner in which the crimes were committed supports the finding that there is a probability that appellant would commit future acts of

violence which would be a continuing threat to society.

*See also Stafford* v. *State*, 665 P.2d 1205 (Okl.Cr. 1983), *vacated*, —— U.S. ——, 104 S.Ct. 2651, 81 L.Ed. 2d 359 (1984), *aff'd.*, 700 P.2d 223 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 188, 88 L.Ed.2d 157 (1985) and *O'Bryan* v. *Estelle*, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984). Under the facts in this case, we find that there is sufficient evidence to support this aggravating circumstance.

Fourth, the appellant urges that if one of the aggravating circumstances was not supported by the evidence, or improperly instructed upon, the death penalty cannot stand. As we have not so found, we will not address this issue. Therefore, this assignment of error is without merit.

The appellant urges in two assignments of error that the aggravating circumstances that "the murder was especially heinous, atrocious, or cruel," and that there exists "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," are being evaluated in an arbitrary manner and therefore violate the rule in *Godfrey* v. *Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) in that our rule provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433. As we have addressed the support for the sufficiency of the evidence on each of these aggravating circumstances, and we address elsewhere in this opinion whether the sentence of death in this case is excessive, we find that the reasoning adequately distinguishes this case from murder cases in which these two aggravating circumstances would not apply.



Additionally, the appellant argues that the trial court failed to define specifically the elements of the aggravating circumstance that there existed the probability that the appellant would constitute a continuing threat to society. Trial counsel failed to object to the court's proposed instructions, and did not offer an instruction on this issue. Accordingly, this issue is not properly preserved for appellate review. *See Nuckols.* Furthermore, we have reviewed the second stage instructions for fundamental error, and find that they gave the jury ample guidance in its consideration of the sentence. *See Nuckols.*

In another assignment of error the appellant contends that the trial court erred in refusing the appellant's requested instruction on mitigating circumstances. An examination of the record reveals that the court did give an instruction on mitigating circumstances, and that when the instructions are read as a whole, the trial court stated all of the applicable law. Therefore, this assignment of error is meritless.

The appellant asserts next that comments made by the prosecutor during closing arguments in both stages denied him a fair trial. We note, however, that none of the comments now complained of drew either an objection or a request that the jury be admonished to disregard said comments. This failure to preserve the alleged error limits our review to a search for fundamental error. *Boomershine* v. *State*, 634 P.2d 1318 (Okl.Cr. 1981). As our review of the prosecutor's comments reveals no error warranting either reversal or modification of the sentence, and in light of the overwhelming evidence of guilt, we find this assignment of error to be without merit.

Appellant reurges several of his assignments of error for the purpose of arguing that defense counsel was ineffective. After examining the record, and considering the guidelines of *Strickland* v. *Washington*, 466 U.S.

——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we fail to find that defense counsel was ineffective.

Finally, the appellant alleges that the penalty of death was disproportionate to the penalty imposed in similar cases. In addition, this Court is required to make two (2) determinations relative to the imposition of a death sentence. 21 O.S.Supp.1985, § 701.13(c).

Concerning whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, we find that considering the amount and quality of the evidence against the appellant, that the sentence was not imposed under the influence of any arbitrary factor.

Concerning whether the evidence supports the jury's finding of the statutory aggravating circumstances, we have previously stated that it does.

We therefore find that the appellant's final assignment of error is without merit.

The judgments and sentences are AFFIRMED.

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AN APPEAL FROM THE DISTRICT COURT OF ROGER MILLS COUNTY, OKLAHOMA
THE HONORABLE GARY P. McGINN, DISTRICT JUDGE

BOBBY LYNN ROSS, appellant, was convicted in the District Court of Roger Mills County, Case No. CRF-83-27 of Murder in the First Degree, and Robbery with a Firearm, for which he received sentences of death, and ninety years' imprisonment, respectively, and he appeals. AFFIRMED.

THOMAS G. SMITH
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Assistant Attorney General
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Attorneys for Appellee

Opinion by BUSSEY, J.
BRETT, J., Concurs

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

---

No. F-83-780

BOBBY LYNN ROSS,
*Petitioner,*

-vs-

THE STATE OF OKLAHOMA,
*Respondent.*

---

**ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE**

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NOW on this 25th day of April, 1986, having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 28th day of April, 1986.

/s/ Tom Brett
TOM BRETT
Judge

/s/ Hez J. Bussey
HEZ J. BUSSEY
Judge

ATTEST:
/s/ Susan Pattman
(Clerk)



SUPREME COURT OF THE UNITED STATES

---

No. 86-5309

BOBBY LYNN ROSS,
*Petitioner*

v.

OKLAHOMA

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA**

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 15, 1987

# PETITIONER'S

# BRIEF

(5)

Supreme Court, U.S.
FILED
AUG 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-5309

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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BOBBY L. ROSS,

*Petitioner,*

v.

OKLAHOMA,

*Respondent.*

---

**On Writ Of Certiorari To The Court Of Criminal Appeals Of Oklahoma**

---

## BRIEF OF PETITIONER

---

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## QUESTIONS PRESENTED

1(a) When a state trial court overrules a challenge for cause to a juror who promises to vote automatically for a death sentence, thereby forcing a criminal defendant to use one of his limited number of peremptory challenges to remove the juror, does the resulting reduction in the number of available peremptory challenges violate the defendant's rights under the Sixth and Fourteenth Amendments?

1(b) If a constitutional error at trial causes an actual reduction in the number of peremptory challenges available to a criminal defendant during jury selection, can the error be regarded as harmless?

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## CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma is reported at 717 P.2d 117 (Okla. Crim. App. 1986). No opinions were prepared in the trial court.

## JURISDICTION

The judgment of the Court of Criminal Appeals of Oklahoma was entered on April 4, 1986 (J.A. 33). A petition for rehearing was denied by the Court of Criminal Appeals of Oklahoma on April 28 1986 (J.A. 48). On May 28, 1986, Justice White extended the time to petition for certiorari to Sunday, July 27, 1986. The petition for writ of certiorari was filed on Monday, July 28, 1986.

The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Okla. Stat., Tit. 22, § 654 (1981) provides:

> A peremptory challenge may be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must excuse him.

Okla. Stat., Tit. 22, § 655 (1981) provides:

> In all criminal cases the prosecution and the defendant are each entitled to the following peremptory challenges: Provided, that if two or more defendants are tried jointly they shall join in their challenges; provided, that when two or more defendants have inconsistent defenses they shall be granted separate challenges for each defendant as hereinafter set forth.
>
> First. In prosecutions for first degree murder, nine jurors each.
>
> Second. In other felonies, five jurors each.
>
> Third. In all nonfelony prosecutions, three jurors each.

## STATEMENT OF THE CASE

Early on the morning of January 5, 1983, a police officer, Steven Mahan, was shot and killed after he interrupted the robbery of a motel in Elk City, Oklahoma. The Petitioner and two companions were arrested in Clinton, Oklahoma, later the same morning; all three were charged in the District Court of Beckham County, Oklahoma, with murder in the first degree, Okla. Stat., Tit. 21, § 701.7 (1981), and robbery with a firearm, Okla. Stat., Tit. 21, § 801 (1981) (R. 1).[1] The prosecution thereafter gave notice that it would seek the death penalty against the Petitioner (R. 101).

[1] Citations to the bound volume of record instruments filed in the Court of Criminal Appeals of Oklahoma are prefaced by "R." followed by the page number. Citations to the trial transcript are prefaced by "Tr.", followed by the page number. Citations to the Joint Appendix are prefaced by "J.A.", followed by the page number.



The Petitioner is black, while the decedent in this case was white. According to a report filed by the trial judge, "[r]ace did . . . appear as an issue in the trial," although race "was not raised by the defense" (J.A. 30). The trial judge also reported that the homicide was the subject of "extensive publicity in the community" (J.A. 31). Citing pretrial publicity and the impossibility of obtaining a fair and impartial trial, the defense sought a change of venue from Beckham County (J.A. 8-9). The trial judge granted the motion, noting the "extensive newspaper press reports relative to this case" (J.A. 13-14).

The Petitioner's case was transferred to Roger Mills County, a venue which the Petitioner had specifically opposed in his venue change motion (J.A. 8). The trial would take place in Cheyenne, Oklahoma, a small community twenty-nine miles from Elk City, where the homicide had occurred.

In first degree murder trials in Oklahoma, each party is entitled to nine peremptory challenges during jury selection. Okla. Stat., Tit. 22, § 655 (1981). Before trial, the Petitioner moved to increase the number of defense peremptory challenges, citing the "large amount of prejudiced publicity" in the case (J.A. 4). The motion was denied (J.A. 11-12). The Petitioner also requested the trial court to "life qualify" prospective jurors, in order to assure that jurors could consider a life sentence upon a finding of guilt (J.A. 6-7). The trial court did not rule on this motion, but invited counsel to submit proposed *voir dire* questions for the court's consideration (J.A. 10-11).

The Petitioner's trial began in Cheyenne on September 26, 1983.[2] Jury selection commenced with the drawing of

[2] Before trial, the Petitioner's two codefendants entered negotiated guilty pleas to charges of murder in the second degree and robbery with a firearm (R. 112-15, 129-31). Each was sentenced to concurrent forty-year prison terms (R. 108-09, 132-33).

twelve names from the 150-person venire that had been summoned to the courthouse (Tr. 14). These twelve prospective jurors were sent to a jury room, and then were recalled one by one to the courtroom for individual *voir dire* questioning by the trial judge and counsel (Tr. 21). The *voir dire* examination of each prospective juror took place in the absence of other members of the venire (Tr. 16-17).

Each prospective juror was first questioned by the trial judge (*e.g.*, Tr. 21-26). The judge asked jurors about their ability to recommend a death sentence (*e.g.*, Tr. 24-25), but did not inquire about their ability to recommend a life sentence. With one exception (Tr. 483), the trial judge did not, on his own motion, excuse jurors expressing reservations about the death penalty.

If a prospective juror was not excused after questioning by the trial judge, he or she was next questioned by the prosecutor (*e.g.*, Tr. 26-30), who exercised any challenge for cause against the juror at the close of his questioning. The prosecutor questioned jurors about their ability to return a death sentence, and exercised challenges for cause against several jurors who expressed reservations about the death penalty (Tr. 138, 165, 261, 282, 290, 510). With one exception, these challenges for cause were sustained by the trial judge.

If the prospective juror was not excused after the prosecutor's examination, he or she was next questioned by the defense attorney (*e.g.*, Tr. 30-34), who exercised any challenge for cause at the conclusion of his examination. If a prospective juror was not struck for cause after *voir dire* examination, he or she was sent to the jury room and provisionally seated to hear the case (*e.g.*, Tr. 34).

If a prospective juror was struck after *voir dire*, the name of a replacement juror was drawn from the jury



wheel (*e.g.*, Tr. 37). The replacement juror was immediately called into the courtroom from the hall, and was examined in the same manner described previously (*e.g.*, Tr. 37-52). This procedure was repeated until there were twelve prospective jurors in the jury room who had been examined on *voir dire* and provisionally seated (Tr. 253).

After twelve jurors were provisionally seated, the parties were required to exercise their nine peremptory challenges, one at a time, with the prosecutor exercising the first challenge (Tr. 253). After a prospective juror was excused by a peremptory strike, the name of a replacement juror was drawn from the jury wheel. The replacement juror was called into the courtroom from the hall and examined on *voir dire* as described previously (*e.g.*, Tr. 253-61). As soon as there were again twelve prospective jurors in the jury room who had been qualified against challenges for cause, the trial judge called for the exercise of another peremptory strike (*e.g.*, Tr. 265). This procedure was repeated, with the parties alternating in the exercise of peremptory challenges, until all peremptory challenges had been exhausted or waived.

As *voir dire* progressed, it became evident that the pretrial publicity concerning the homicide had not been limited to Beckham County. Of the forty-six Rogers Mills County residents who were questioned on *voir dire*, only five said that they had not heard about the case (Tr. 71, 227, 262, 291, 337). Of the forty-one prospective jurors who had heard about the case, twenty said that they had read about it in the Elk City newspaper (Tr. 22, 35, 38, 54, 89, 100-01, 109, 125, 142, 155-56, 166, 183, 197, 212, 214, 241, 243-44, 255, 267, 278, 284, 287, 302, 317, 330, 332, 349, 358, 369, 379-80, 393, 411, 426, 440, 459, 477, 485, 488, 501, 512, 523). Six prospective jurors were excused by the trial judge (Tr. 37, 108, 213, 286, 330, 487), and four

more were successfully challenged for cause by the defense (Tr. 69, 98, 328, 500), on the ground that they had formed fixed opinions or otherwise could not fairly try the case.

The court session for the first day of jury selection lasted fourteen hours and twenty minutes. An evening recess was called so that jurors could eat a meal before the local cafes closed, but *voir dire* resumed at 9:00 p.m. and continued into the night (Tr. 328). The last prospective juror to be examined that night was Darrell Huling, who was called into the courtroom to replace a juror who had been excused by the defense's fifth peremptory challenge (Tr. 378).

Both the prosecutor and the defense attorney questioned Mr. Huling about his ability to impose a life sentence upon conviction. The prosecutor phrased his questions in general terms, asking whether Mr. Huling would be able to recommend a life sentence "if [he] felt the circumstances appropriate"; Mr. Huling said that he could do so (J.A. 17). The defense attorney phrased his questions more specifically, asking about the sentence that Mr. Huling would actually impose in the Petitioner's case:

> Q. Just because you found him guilty you wouldn't necessarily give him the death penalty, would you?
>
> A. Yes.
>
> Q. Oh, you would? If you found him guilty then in your own mind you would give him the death penalty?
>
> A. Yes.
>
> Q. You wouldn't consider anything else?
>
> A. No.



(J.A. 18). After concluding his examination of Mr. Huling, the defense attorney challenged him for cause on the grounds that he could not follow the law handed down in the sentencing phase of the case, and would therefore not be a fair and impartial juror. The trial judge overruled the challenge (J.A. 19).

After Mr. Huling was sent to the jury room to join the other prospective jurors who had been provisionally seated, the trial judge called on the prosecutor to exercise his sixth peremptory challenge, which the prosecutor waived. The trial judge then called upon the defense attorney to exercise his sixth peremptory challenge, which the defense attorney used against Mr. Huling. After excusing Mr. Huling, the trial judge adjourned court for the night (J.A. 19-20).

*Voir dire* examination and exercise of peremptory challenges resumed the next day. After the defense had exercised its ninth and last peremptory challenge, a final replacement juror was called into the courtroom, and examined on *voir dire*. Neither side challenged the juror for cause, and he was sent to the jury room (J.A. 25). The defense attorney then objected "to the composition of the twelve people, in that there were no black people called as jurymen in this case and the defendant feels he's denied a fair and impartial trial by his peers." The objection was overruled (J.A. 25). After an alternate was selected, the twelve jurors and the alternate were sworn to try the case (Tr. 538).

During jury selection, the defense used all nine of its peremptory challenges (Tr. 265, 301, 348, 356, 378; J.A. 19; Tr. 425, 439; J.A. 24). The prosecution used five peremptory challenges (Tr. 253, 276, 316, 368, 410) and waived four (Tr. 356; J.A. 19; Tr. 439; J.A. 24).

The jury heard evidence for the next two days. After closing arguments were presented, the trial judge discharged the alternate and submitted the case to the original twelve jurors (Tr. 990). The jury returned with verdicts of guilty on the charges of murder in the first degree and robbery with a firearm, and imposed a sentence of ninety-nine years imprisonment on the charge of robbery with a firearm (R. 325-26).[3] During a separate capital sentencing proceeding, the same jurors found five statutory aggravating circumstances and sentenced the Petitioner to death on the first degree murder charge (R. 356, 358).[4] The trial judge entered judgment in accordance with the jury's verdicts (R. 378-80).

The Petitioner appealed his convictions and sentences to the Court of Criminal Appeals of Oklahoma, a three-member tribunal which is Oklahoma's highest court in criminal cases. In a 2-0 decision, with one judge not participating, the Court of Criminal Appeals affirmed the Petitioner's convictions and sentences. The Oklahoma court stated that "[t]he failure of the trial court to remove a prospective juror who unequivocally states that he is

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[3] The opinion of the Court of Criminal Appeals of Oklahoma (J.A. 33, 47) incorrectly states that the Petitioner received a sentence of ninety years imprisonment on the robbery with a firearm charge.

[4] The aggravating circumstances found by the jury were that the defendant knowingly created a risk of death to more than one person, Okla. Stat., Tit. 21, § 701.12(2) (1981), that the murder was especially heinous, atrocious or cruel, Okla. Stat., Tit. 21, § 701.12(4) (1981), that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, Okla. Stat., Tit. 21, § 701.12(5) (1981), that ere was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, Okla. Stat., Tit. 21, § 701.12(7) (1981), and that the victim of the murder was a peace officer, Okla. Stat., Tit. 21 § 701.12(8) (1981).



unwilling to follow the law during the penalty phase by considering a life sentence is error" (J.A. 36-37). However, the Oklahoma court noted that the prospective juror had been removed by a peremptory challenge and concluded that "as there is nothing in the record to show that any juror who sat on the trial was objectionable, we are unable to discover any grounds for reversal" (J.A. 37).

## SUMMARY OF ARGUMENT

### A.

Mr. Huling, a juror called in the Petitioner's case, said on *voir dire* that he would give the Petitioner the death penalty upon conviction, and would consider no other penalty. Because Mr. Huling was not impartial on the issue of punishment, the trial judge violated the Sixth and Fourteenth Amendments by overruling the Petitioner's challenge for cause against Mr. Huling.

### B.

Because it assures the selection of an impartial jury, the right of peremptory challenge has been characterized by this Court as "one of the most important of the rights secured to the accused." *Pointer* v. *United States*, 151 U.S. 396, 408 (1894). While this right has never explicitly been declared a constitutional requirement, it is guaranteed to the Petitioner under Oklahoma law; this law created a substantial and legitimate expectation that the Petitioner would be deprived of his life and liberty only after a trial in which the Petitioner's nine peremptory jury challenges could be freely exercised. By reason of the trial judge's erroneous seating of Mr. Huling, the Petitioner was deprived of the effective use of one of these challenges, which he had to use against Mr. Huling. The trial judge's error has arbitrarily deprived the Petitioner of his

right to peremptory challenge, in violation of the due process clause of the Fourteenth Amendment. See *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).

C.

In order to obtain appellate review of the seating of Mr. Huling, Oklahoma law required the Petitioner to exercise one of his four remaining peremptory challenges against Mr. Huling, and thereafter to exhaust his peremptory challenges. Although these steps resulted in removal of Mr. Huling from the Petitioner's jury, they did so only at the cost of reducing the number of peremptory strikes available for use by the Petitioner on other prospective jurors. Because the reduction in his peremptory challenges has needlessly penalized the Petitioner's assertion of his constitutional right to an impartial jury, this reduction has violated the Sixth and Fourteenth Amendments. See *United States* v. *Jackson*, 390 U.S. 570 (1968).

D.

The constitutional error in this case forced the Petitioner to use a peremptory challenge against Mr. Huling. If the error had not occured, this strike could have been used against another juror, and could thereby have changed the membership of the Petitioner's jury. Because the effect of jury membership changes on jury deliberations cannot be ascertained with confidence, an error which could have changed the jury's composition cannot be declared harmless beyond a reasonable doubt. If jury panel membership "could possibly have been affected" by the erroneous impairment of the Petitioner's peremptory challenges, the error was not harmless. *Gray* v. *Mississippi*, ___ U.S. ___, ___, 107 S.Ct. 2045, 2055 (1987).



The Oklahoma court denied relief for the unlawful impairment of the Petitioner's peremptory challenges because the Petitioner's trial counsel did not attempt to exercise a hypothetical tenth peremptory challenge against any member of the actual trial jury. Such a requirement is unjustified because such a hypothetical challenge, exercised at the conclusion of jury selection, would not reveal how jury selection would have proceeded if a constitutional error at an earlier stage of selection had not occurred. *Gray* v. *Mississippi*, *supra*. Because a hypothetical challenge has no probative value, its exercise should not be a condition for obtaining relief from an unconstitutional impairment of peremptory challenges.

If the constitutional error had not occurred, and an additional peremptory challenge had thus been available, the conduct of the Petitioner's trial counsel indicates that this additional challenge would have been used: counsel unsuccessfully asked for additional peremptory challenges before trial, exhausted his peremptory challenges at trial, and expressed dissatisfaction with the final composition of the Petitioner's jury. Since the use of an additional challenge could have affected the composition of the Petitioner's jury, the impairment of the Petitioner's peremptory challenges was not harmless. This impairment requires reversal of the Petitioner's convictions.

## ARGUMENT

Mr. Huling, a prospective juror called in the Petitioner's trial, said twice on *voir dire* that he would give the Petitioner the death penalty upon conviction, and went on to say that he would not consider any other penalty for the Petitioner (J.A. 18). Because of his views, Mr. Huling was not an "impartial" juror as required by the United States Constitution. We submit that the seating of Mr. Huling on

the Petitioner's jury violated the Constitution, and that his subsequent removal by peremptory challenge did not cure this violation.

**A. The Seating Of Mr. Huling Violated The Sixth And Fourteenth Amendments.**

The Sixth Amendment, held applicable to the States through the Fourteenth Amendment in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), guarantees a criminal defendant a trial by an "impartial jury." Principles of due process likewise assure a trial by impartial, "indifferent" jurors. *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). When trial jurors will be required to set a sentence, the jury impartiality required by the Constitution must extend to the issue of the sentence to be imposed, which could have been either the death penalty or life imprisonment in this case. Okla. Stat., Tit. 21, § 701.10 (1981), see *Witherspoon* v. *Illinois*, 391 U.S. 510, 518 (1968) (capital defendant entitled by Sixth and Fourteenth Amendments to impartial punishment jury). A juror such as Mr. Huling, who had decided before hearing any evidence to sentence the Petitioner to death, was not the "impartial" juror required by the Constitution.

Since Mr. Huling was not an impartial juror, the trial judge's action in seating Mr. Huling on the Petitioner's jury violated the Sixth and Fourteenth Amendments. The Court of Criminal Appeals of Oklahoma was correct in its conclusion that "[t]he failure of the trial court to remove a prospective juror who unequivocally states that he is unwilling to follow the law during the penalty phase by considering a life sentence is error" (J.A. 36-37).

**B. The Arbitrary Reduction Of The Petitioner's Peremptory Challenges Denied Him Due Process Of Law In Violation Of The Fourteenth Amendment.**

The Petitioner had an unconditional right, guaranteed by Okla. Stat., Tit. 22, § 655 (1981), to exercise nine



peremptory challenges during the selection of his jury. Because of the trial judge's erroneous ruling on the challenge for cause against Mr. Huling, the Petitioner was deprived of the effective use of one of these challenges, which had to be used to remedy the trial judge's error. We submit that the resulting reduction of the Petitioner's peremptory challenges operated to deprive the Petitioner of his life and liberty without due process of law.

While this Court has never held peremptory jury challenges to be guaranteed by the Constitution, the right to exercise such challenges is nonetheless a valuable one, because it permits a criminal defendant to participate in the selection of the persons who will decide his fate. The right to exercise peremptory challenges, as this Court stated in *Pointer* v. *United States*, 151 U.S. 396, 408 (1894), is "one of the most important of the rights secured to the accused."[5] The importance of peremptory challenges has been recognized by the Oklahoma courts as well. See, *e.g.*, *Bass* v. *State*, 733 P.2d 1340, 1341 (Okla. Crim. App. 1987) ("Depriving counsel of information that could lead to the intelligent exercise of a peremptory challenge is a denial of an appellant's right to a fair and impartial jury").

The circumstances of this case confirm the value of the Petitioner's peremptory challenges: the Petitioner, who is black, was tried in a community that was almost entirely white for the extensively publicized murder of a white man. The trial judge found that race was an issue during the Petitioner's trial, although the issue was not of the

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[5] See also *Batson* v. *Kentucky*, 476 U.S. ____, ____, n.22, 106 S.Ct. 1712, 1724, n.22 (1986) ("historic trial practice, which long has served the selection of an impartial jury"); *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965) (citing "long and widely held belief that peremptory challenge is a necessary part of trial by jury").

Petitioner's making (J.A. 29-31). Such conditions created a significant danger of juror prejudice against the Petitioner.[6] Since *voir dire* questioning could not be expected to render every prejudiced juror subject to a challenge for cause, peremptory challenges were vital to seating an impartial jury.[7] Because the Petitioner's peremptory strikes were an essential means of assuring the fairness of his trial, we submit that the arbitrary impairment of these challenges was inconsistent with the due process of law guaranteed by the Fourteenth Amendment.

This Court has recognized that procedural safeguards accorded a criminal defendant, while not required by the United States Constitution, may nonetheless be protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), for example, this Court considered Oklahoma's right to jury sentencing. The

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[6] See *Turner* v. *Murray*, 476 U.S. ——, ——, 106 S.Ct., 1683, 1687 (1986).

[7] See J. Van Dyke, Jury Selection Proceedures: Our Uncertain Commitment to Representative Panels 146 (1977):

> Peremptory challenges may be used when an attorney suspects a prospective juror of being biased but cannot prove it to the judge according to the guidelines set down for challenges for cause. Many judges, when faced with a juror's statement that he or she is not prejudiced against an individual or group involved in the case, will accept that statement at face value (as perhaps the judge must, if he or she is not to make judgments on the juror's personal integrity). The attorney may still suspect prejudice but be unable to prove it. In such a case, the prospective juror can be challenged peremptorily.

Cf. *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984) ("Demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges").



*Hicks* defendant had been deprived of his right to a jury sentence when a trial judge, because of a legal error, instructed the defendant's jury as to the wrong punishment limits. The state appellate court merely upheld the jury's sentence as within legal limits, without ordering a new sentencing trial by a properly instructed jury. This Court rejected the contention that jury sentencing was "merely a matter of state procedural law." Instead, the Court held that the defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury." 447 U.S. at 346. The Court concluded that the right to jury sentencing was protected by the Fourteenth Amendment, and that it had been arbitrarily deprived by the Oklahoma courts, without due process of law.

Just as an Oklahoma criminal defendant has a "substantial and legitimate expectation" that his sentence will be set by a jury, as in *Hicks*, he also has a substantial and legitimate expectation of influencing the composition of that jury by use of the peremptory challenges granted him by Oklahoma statute. In view of the vital role that such challenges play in the selection of an impartial jury, we submit that these challenges represent an interest in life and liberty that is protected by the Fourteenth Amendment.

In the *Hicks* case, the defendant was arbitrarily deprived of his right to jury sentencing because of a legal error by the trial judge, who misinstructed the defendant's jury. In this case as well, a legal error by the trial judge—the erroneous seating of Mr. Huling—was the reason for the reduction in the Petitioner's peremptory challenges. In this case, just as in *Hicks*, the loss of the Petitioner's valuable right by reason of a legal error of a trial judge is fundamentally inconsistent with the due

process of law required by the Fourteenth Amendment. See *Walker* v. *Sauvinet*, 92 U.S. 90, 93 (1876) ("Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State").

Although the Petitioner was not deprived of a peremptory challenge simultaneously with the erroneous seating of Mr. Huling, the loss of this peremptory challenge followed inevitably from the Petitioner's compliance with the State-mandated procedure for remedying the seating of that juror. Under this procedure, the Petitioner was required to sacrifice a peremptory challenge, by using it on Mr. Huling, in order to enforce his constitutional right to an impartial jury. See *McDonald* v. *State*, 54 Okla. Crim. 161, 164-165, 15 P.2d 1092, 1094 (1932). Since the Petitioner's right to peremptory challenge was lost by operation of an "established state procedure," this procedure has deprived the Petitioner of life and liberty without due process of law. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982).

One consequence of the reduction of the Petitioner's peremptory challenges was that it left the Petitioner in a disadvantaged position with respect to the State: the State had nine opportunities to strike jurors peremptorily while the Petitioner effectively had only eight such opportunities. This disadvantage is important, since this Court has recognized that the Fourteenth Amendment's due process clause speaks "to the balance of forces between the accused and his accuser." *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973).

In *Wardius*, this Court held that a state statute which required a criminal defendant to give notice of an alibi defense to the prosecution violated the due process clause



of the Fourteenth Amendment, because it did not require the State to provide reciprocal discovery to the defendant. The Court noted that it has "been particulary suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." 412 U.S. at 474, n.6. The fact that the State procedure involved here conferred a "nonreciprocal benefit" on the State—a favorable imbalance in peremptory challenges—confirms that the deprivation of the Petitioner's peremptory challenge has denied him due process of law.

### C. By Granting An Impartial Jury Only At The Cost Of Impairing Defense Peremptory Strikes, Oklahoma Has Unlawfully Penalized The Exercise Of Sixth And Fourteenth Amendment Rights.

Faced with a juror whose seating violated the Sixth and Fourteenth Amendments, the Petitioner's trial counsel followed the procedures prescribed by the Oklahoma courts for remedying the constitutional violation. These procedures effected the removal of Mr. Huling from the Petitioner's jury, but they also significantly impaired the Petitioner's exercise of his peremptory challenges. Because the Petitioner was able to assert and enforce his constitutional right to an impartial jury only at the cost of restriction of his peremptory strikes, we submit that this constitutional right has been unlawfully penalized.

The first step taken by the Petitioner's counsel to remedy the seating of Mr. Huling was to challenge him for cause, in accordance with Okla. Stat., Tit. 22, §659(2) (1981). When the challenge for cause was overruled, the Petitioner was next required: (1) to use one of his four remaining peremptory strikes on Mr. Huling; and (2) to use the rest of his peremptory strikes before jury selection was completed. See *McDonald* v. *State*, 54 Okla.

Crim. 161, 164-65, 15 P.2d 1092, 1094 (1932); *Davis* v. *State*, 44 Okla. Crim. 141, 143, 279 P. 976, 977 (1929). The Petitioner's trial counsel took both of these steps; had he not done so, the constitutional objection to Mr. Huling's seating would have been waived. See *Carpitcher* v. *State*, 586 P.2d 75, 77 (Okla. Crim. App. 1978).[8]

The Petitioner's compliance with Oklahoma's procedure for challenging the unconstitutional seating of Mr. Huling effectively denied him the use of one of his peremptory challenges, which he was required to use against Mr. Huling. This challenge could have been used against another juror had the trial judge properly removed Mr. Huling from the jury.[9] The Oklahoma procedure for remedying the unconstitutional seating of a juror thus worked a significant impairment on the Petitioner's exercise of his peremptory challenges—an impairment which disadvantaged the defense with respect to the prosecution, which did not suffer a corresponding limitation on its nine peremptory strikes.

The impairment of the Petitioner's peremptory challenges operated as a penalty on the Petitioner's assertion of his Sixth and Fourteenth Amendment rights to an

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[8] Such a failure to comply with Oklahoma procedure presumably would have foreclosed review of the constitutionality of the seating of Mr. Huling by this Court as well. See *Parker* v. *Illinois*, 333 U.S. 571, 574 (1948).

[9] The procedure also required the Petitioner to use the last of his nine peremptory challenges, even though tactical considerations might have dictated that the last peremptory challenge be waived. See A. Amsterdam, Trial Manual for the Defense of Criminal Cases § 331 at 1-455 (4th ed. 1984):

> If the struck juror is going to be replaced by an unknown quantity who may be worse, counsel will generally not strike unless s/he is affirmatively dissatisfied. S/he will almost never use his last strike, since the replacement for the last struck juror may be a horror—and unstrikable.



impartial jury. Such a penalty on the exercise of a constitutional privilege "cuts down on the privilege by making its assertion costly." *Griffin* v. *California*, 380 U.S. 609, 614 (1965). We submit that the penalty involved here violated the Sixth and Fourteenth Amendments.

This Court considered a similar penalty on the Sixth Amendment jury trial right in *United States* v. *Jackson*, 390 U.S. 570 (1968). The defendant in *Jackson* was charged with violating a criminal statute which authorized capital punishment for defendants who asserted the Sixth Amendment right to a jury trial, but which prescribed a maximum sentence of life imprisonment for defendants who waived that right by pleading guilty. The effect of this provision was to penalize, by exposure to a possible death penalty, those persons who asserted their Sixth Amendment rights. The Court recognized that such a scheme could have been motivated by legitimate goals, such as to "mitigate the serverity of punishment." 390 U.S. 582. However, the Court held that such goals could be achieved through alternative schemes which did not punish those who demanded their Sixth Amendment rights. Because the *Jackson* statute operated "in a manner that needlessly penalizes the assertion of a constitutional right," 390 U.S. at 583, the Court ruled its death penalty provisions unconstitutional.[10]

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[10] See also *Brooks* v. *Tennessee*, 406 U.S. 605, 610-11 (1972) (statute requiring defendant to testify as first defense witness, if at all, penalizes exercise of defendant's Fifth Amendment privilege, thereby violating Fifth Amendment); *North Carolina* v. *Pearce*, 395 U.S. 711, 724 (1969) (vindictive imposition of higher sentence on retrial, after successful appeal of conviction because of constitutional error, penalizes assertion of constitutional right, thereby denying due process of law); *Griffin* v. *California*, 380 U.S. 609, 614 (1965) (prosecutor comment on defendant's exercise of Fifth Amendment privilege held to penalize exercise of privilege, thereby violating Fifth Amendment).

The State-mandated impairment of the Petitioner's peremptory challenges has penalized the exercise of one of the same constitutional rights at issue in *Jackson:* the right to an impartial jury trial. Moreover, the penalty imposed on the Petitioner was as needless as the one in *Jackson:* an appellate court could have reviewed the ruling on the challenge for cause against Mr. Huling even if he had not been excused by peremptory challenge.[11] Indeed, the record on which such appellate review would have been based—Mr. Huling's responses to *voir dire* questioning—would not have been affected by whether a peremptory challenge was used on Mr. Huling.

It is possible that the Oklahoma procedural rules, which required peremptory strikes to be used against a juror unsuccessfully challenged for cause and to be exhausted thereafter, had goals other than the penalization of constitutional rights. For example, requiring defense counsel to use one of his limited number of peremptory strikes on Mr. Huling may have assured the appellate court that counsel was sincere in his challenge for cause of that juror. However, there were other means, that did not impair peremptory challenges, that could have assured that counsel's challenge was made in good faith.[12] The impairment of the Petitioner's peremptory challenges needlessly penalized his constitutional right to an impartial jury, and thereby violated the Sixth and Fourteenth Amendments.

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[11] See, *e.g.*, *Leon* v. *State*, 396 So. 2d 203, 205 (Fla. App. 1981) (no requirement that juror unsuccessfully challenged for cause be excused by peremptory strike).

[12] See, *e.g.*, Oklahoma Supreme Court Code of Professional Responsibility, DR 1-102(A)(4) ("A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation").



**D. The Unconstitutional Impairment Of The Petitioner's Peremptory Challenges Was Not Harmless.**

**1. Impairment Of Peremptory Challenges Which Could Have Affected The Composition Of A Jury Panel Cannot Be Harmless.**

The constitutional error in jury selection in this case prejudiced the Petitioner by forcing him to waste a peremptory challenge on Mr. Huling, a juror who should have been excused for cause. If the Petitioner had not been forced to use a peremptory strike on Mr. Huling, he would have had an extra challenge available for use against another prospective juror. Such an extra strike, if exercised, could have altered the composition of the Petitioner's jury. We submit that the possibility of such a differently composed jury requires a finding that the constitutional error was not harmless.

*Chapman* v. *California*, 386 U.S. 18, 24 (1967) holds that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Such a standard is difficult to meet when a constitutional error could have affected the composition of a jury, since a change in a jury's membership will introduce jurors with different personalities and viewpoints into deliberations; these new jurors may lead the case to a different outcome.[13]

Changes in jury panel membership can exert an especially strong influence on the outcome of capital sentencing trials in Oklahoma, because Oklahoma law

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[13] Empirical studies have shown that exercise of peremptory challenges in criminal trials can alter the outcome of these trials. See Zeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 Stan. L. Rev. 491 (1978).

requires the imposition of a life sentence upon jury disagreement as to penalty. Okla. Stat., Tit. 21, § 701.11 (1981). Thus, a change of even one juror on a panel can be enough to alter the outcome of an Oklahoma capital sentencing trial from death to life imprisonment, if the new juror becomes committed to imposing a life sentence.

Because the effect of a change in jury membership on a given jury's deliberations cannot be ascertained with confidence, it is impossible to establish beyond a reasonable doubt that a constitutional error which could have affected the composition of that jury was harmless.[14] Under *Chapman*, an unconstitutional jury selection error which could have affected the jury's composition, such as the peremptory challenge impairment here, requires reversal of any resulting conviction. Such a conclusion finds support in this Court's decisions addressing other composition-affecting errors in jury selection.

In *Harrison* v. *United States*, 163 U.S. 140, 141-42 (1896), a trial court erroneously refused to grant a criminal defendant the full number of peremptory challenges authorized by statute. This Court reversed the resulting conviction, without a showing that any of the jurors who actually tried the case was biased or otherwise unqualified to hear it: the fact that the jury would have been differently composed, but for the error, was sufficient to require reversal. The *Harrison* case was cited in *Swain* v. *Alabama*, 380 U.S. 216, 219 (1965) in support of the proposition that the "denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice. . . ."

*Swain* and *Harrison* are consistent with this Court's decisions in other criminal cases involving constitutional errors in jury selection. These decisions have consistently overturned convictions if a constitutional error could have affected the composition of the jury: no showing that the actual jury was biased or otherwise unqualified has been required. Most recently, in *Gray* v. *Mississippi*, ___ U.S. ___, 107 S.Ct. 2045 (1987), the Court considered the prejudicial effect of the exclusion of a juror in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Quoting from *Moore* v. *Estelle*, 670 F.2d 56, 58 (CA5 1982) (specially concurring opinion), the Court held that "the relevant inquiry is 'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error' (emphasis in original)." ___ U.S. at ___, 107 S.Ct. at 2055. See also *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury selection requires overturning conviction); *Batson* v. *Kentucky*, 476 U.S. ___, 106 S.Ct. 1712 (1986) (racial discrimination in petit jury selection requires reversal of conviction). These decisions confirm that an unconstitutional abridgment of the Petitioner's peremptory challenges should be regarded as prejudicial, if the error could have affected the composition of the Petitioner's jury.

This Court's decision in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1983) does not dictate any departure from the principles represented by *Swain* and *Harrison*. *McDonough* was a federal civil case in which a juror had incorrectly responded to a material

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[14] Cf. *Cassell* v. *Texas*, 339 U.S. 282, 301-02 (1950) (Jackson, J., dissenting):

> It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. . . .

*voir dire* question; the incorrect response was discovered only after the trial on which that juror sat had been completed. A federal appellate court ordered a new trial because the incorrect response had "prejudiced [the parties'] right to peremptory challenge." This Court reversed, holding that a new trial would be justified only if "a correct response would have provided a valid basis for a challenge for cause." 464 U.S. at 556.

The impairment of peremptory challenges in *McDonough* was the result, not of an action by a trial judge or other government official, but "because of a juror's mistaken, though honest, response to a question. . . ." 464 U.S. at 555.[15] There was no way that the parties or the judge could have known of the incorrect response while the jury was being selected. If a new trial had been ordered, the juror who answered mistakenly would not have participated, so his mistaken response could not have been corrected by a retrial. Moreover, there was no way of preventing the jurors at retrial from making honestly mistaken responses of their own during *voir dire*. In such a situation, a new trial would not have assured any more intelligent exercise of peremptory challenges than was possible at the first trial. Under these circumstances, this Court declined to reverse a judgment without a showing that the impairment of peremptory strikes caused an unqualified person to sit on the jury.

In this case, in contrast to *McDonough*, the impairment of peremptory challenges was the direct result of an

[15] Compare *Turner* v. *Murray*, 476 U.S. ____, 106 S.Ct. 1683 (1986), in which a trial judge's action in conducting a constitutionally inadequate *voir dire* of a capital jury was held to require vacation of the death sentence imposed by that jury, without a showing that any trial juror was biased or disqualified.



unconstitutional action by a state trial judge, and this action was promptly brought to the judge's attention when it could have been corrected. Because state trial judges are bound to follow constitutional rulings of appellate courts, the same constitutional error will not recur if a retrial is held. At a retrial, the Petitioner can therefore expect to exercise his peremptory challenges freely, a right that he was denied during his first trial.

Because the corrective measure of a new trial can actually restore the rights that were denied the Petitioner, the considerations that motivated the *McDonough* decision do not apply to the same extent here. The Court should therefore continue to hold, in consonance with *Swain* and *Harrison*, that an abridgement of a criminal defendant's peremptory challenges requires reversal of the defendant's conviction, if the abridgement could have affected the jury's composition.

**2. The Petitioner Has Shown That The Composition Of His Jury Could Have Been Affected By The Impairment Of His Peremptory Challenges.**

The Petitioner's jury could have been differently composed if an extra defense peremptory challenge, made available by excusing Mr. Huling for cause, had been used on another juror. The record strongly suggests that such an extra peremptory strike would indeed have been used: the Petitioner's counsel unsuccessfully asked for additional peremptory strikes before trial (J.A. 4-5, 11-12), used all nine of his peremptory strikes at trial, and expressed dissatisfaction with the jury as finally empanelled (J.A. 25). We submit that this evidence is sufficient to establish that an extra challenge would have been used, and that the impairment of the Petitioner's peremptory challenges therefore could have affected the composition of his jury.

Many courts would hold that the Petitioner's exhaustion of his peremptory challenges was adequate to show that an erroneously deprived challenge would have been used, and could thereby have altered the jury's composition.[16] The Court of Criminal Appeals of Oklahoma, however, required the Petitioner to make a further showing that a "juror who sat on the trial was objectionable" (J.A. 37).[17] Since the identities of trial jurors were not finally determined until all peremptory strikes had been used,

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[16] For decisions ordering a new trial when peremptory challenges were exhausted after a challenge for cause had been erroneously overruled, see *United States* v. *Nell*, 526 F.2d 1223, 1229 (CA5 1976); *United States* v. *Allsup*, 566 F.2d 68, 71-72 (CA9 1977); *United States* v. *Martin*, 749 F.2d 1514, 1518 (CA11 1985); *People* v. *Rogers*, 690 P.2d 886, 888 (Colo. App. 1984); *Bradham* v. *State*, 243 Ga. 638, 639-40, 256 S.E.2d 331, 332 (1979); *State* v. *Smith*, 491 So.2d 641, 646 (La. 1986); *People* v. *Culhane*, 33 N.Y.2d 90, 97, 305 N.E.2d 469, 473 (1973); *Commonwealth* v. *Jones*, 477 Pa. 164, 383 A.2d 874, 876 (1978); *State* v. *Moore*, 562 P.2d 629, 630-31 (Utah 1977).

For decisions ordering a new trial when a peremptory challenge was used on a juror who should have been excluded for cause, in which the opinion either indicates that peremptory strikes were not exhausted or is silent on this question, see *Wasko* v. *Frankel*, 116 Ariz. 288, 569 P.2d 230, 232 (1977) (civil case); *Harris* v. *State*, 255 Ga. 464, 465, 339 S.E.2d 712, 713-14 (1986); *State* v. *Land*, 478 S.W.2d 290, 292 (Mo. 1972); *Breeden* v. *Commonwealth*, 217 Va. 297, 300, 227 S.E.2d 734, 736-37 (1976); *State* v. *West*, 157 W.Va. 209, 219, 200 S.E.2d 859, 866 (1973).

See also *Hill* v. *State*, 477 So.2d 553, 556 (Fla. 1985) (new trial ordered when defendant exhausted peremptory strikes and unsuccessfully sought additional peremptory strikes); *State* v. *Parnell*, 77 Wash.2d 503, 508, 463 P.2d 134 137 (1969) (same).

[17] In a decision announced shortly after the opinion in the Petitioner's case, the Court of Criminal Appeals of Oklahoma affirmed a conviction on facts similar to those here, because there had been no showing that an "unacceptable" person sat on the trial jury. *Hawkins* v. *State*, 717 P.2d 1156, 1158 (Okla. Crim. App. 1986).



the Oklahoma court effectively required the Petitioner to attempt a tenth peremptory challenge against the trial jury as impaneled.

A tenth peremptory challenge by the Petitioner would have been futile as a way of changing the jury's composition, since the trial judge lacked the authority to confer peremptory challenges in excess of the nine granted each side by statute. See *Prichard* v. *State*, 539 P.2d 392, 393-94 (Okla. Crim. App. 1975). If such a tenth peremptory challenge were to be exercised on a strictly hypothetical basis, as dictated by the Oklahoma court, it would have had little, if any, probative value as to how jury selection would have proceeded iin the absence of the constitutional error.

A hypothetical peremptory challenge, similar to the one required by the Oklahoma appellate court, was considered by this Court in *Gray* v. *Mississippi*, ___ U.S. ___, 107 S.Ct. 2045 (1987). After a juror was erroneously excused for cause, the prosecutor in *Gray* stated that he would have used one of his peremptory strikes on that juror had his challenge for cause been overruled. In deciding that the exclusion was prejudicial, this Court refused to accord any weight to the prosecutor's hypothetical challenge: "Even if one is to believe the prosecutor's statement . . . we cannot know whether in fact he would have had this peremptory challenge left to use." ___ U.S. at ___, 107 S.Ct. at 2055. The Court reasoned that if prosecution challenges of jurors for cause had been granted, rather than overruled, during earlier stages of jury selection, the prosecutor may have used his peremptory challenges differently in response. Such a different pattern of peremptory strikes could have led to a differently composed panel, and could even have led to exhaustion of the prosecutor's peremptory challenges. Because the pros-

ecutor's hypothethical peremptory challenge might never have been exercised if preceding stages of jury selection had taken place differently, the hypothetical peremptory challenge of a juror did not prove whether the error in excluding that juror was harmful or harmless. We submit that a hypothetical peremptory challenge by defense counsel in this case would have been equally valueless.

The constitutional error in this case forced the Petitioner to use his sixth peremptory challenge on Mr. Huling. Had the sixth defense peremptory strike been exercised differently, the prosecutor may have exercised his remaining peremptory strikes differently in response. The result could have been a different panel by the time that jury selection was completed. A hypothetical tenth peremptory challenge, exercised by defense counsel at the conclusion of jury selection, would have had little meaning: the jury against which such a hypothetical challenge woud have been exercised may not have had the same membership as the jury which would have resulted if Mr. Huling had properly been excused for cause. Just as in *Gray*, a hypothetical peremptory challenge in this case would not have proven whether an earlier constitutional error in jury selection was harmful or harmless.

The hypothetical peremptory challenge required by the Oklahoma appellate court cannot show how jury selection would have proceeded in the absence of the constitutional violation. Since it lacks probative value, the exercise of such a hypothetical challenge should not be a condition for relief from the unconstitutional impairment of the Petitioner's peremptory strikes.

By his unsuccessful request for additional peremptory challenges before trial, by his exhaustion of peremptory challenges at trial, and by the dissatisfaction that he



expressed with the trial jury, the Petitioner's trial counsel showed that an extra peremptory strike, if available, would have been used. Since the use of such a strike could have altered the composition of the Petitioner's jury, the unconstitutional impairment of the Petitioner's peremptory challenges was not harmless beyond a reasonable doubt.

### 3. The Petitioner's Convictions And Sentences Must Be Reversed.

The jury which heard the Petitioner's case convicted and sentenced him, both for the offense of murder in the first degree and for the offense of robbery with a firearm. Since the impairment of peremptory challenges could have affected the composition of the jury which decided guilt and sentence on both of these charges, all of the Petitioner's convictions and sentences violated the Sixth and Fourteenth Amendments and must therefore be reversed.

## CONCLUSION

The judgment of the Court of Criminal Appeals of Oklahoma should be reversed.

Respectfully submitted,

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# RESPONDENT'S

# BRIEF

(6)

No. 86-5309

Supreme Court, U.S.
FILED
SEP 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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BOBBY LYNN ROSS,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

---

# BRIEF OF RESPONDENT

---

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## QUESTIONS PRESENTED

1. Whether a criminal Defendant has been deprived of any constitutional right in jury selection by the arguably erroneous ruling on a challenge for cause to a juror, later excused by peremptory challenge, if the Defendant passes for cause each member of the jury which is finally seated.

2. Whether the Oklahoma statutes providing for peremptory challenges in criminal cases create an interest in life or liberty protected by the Fourteenth Amendment and, whether an arguably erroneous ruling on a challenge for cause of a juror, later excluded by peremptory challenge, deprived the Defendant of a constitutional right by an "established state procedure."

3. Whether in a case in which factual guilt was fairly and reliably determined by an impartial jury and Defendant was represented by counsel,

constitutional error, if any, in requiring exclusion of a questionable juror by peremptory challenge is harmless beyond a reasonable doubt.

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No. 86-5309

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

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BOBBY LYNN ROSS

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

---

# BRIEF OF RESPONDENT

---

## STATEMENT OF THE CASE

Petitioner, hereinafter Defendant, files this case seeking review of a decision of the Oklahoma Court of Criminal Appeals affirming his conviction of First Degree Murder and imposition of the death penalty and affirming his conviction for armed robbery. The opinion of the Court of Criminal Appeals is Ross v. State, 717 P.2d 117 (Okl.Cr.App. 1986). While the principal

issues presented to this Court involve proceedings during jury selection, an understanding of the state's case against the defendant on guilt is also necessary for a resolution of these issues. Therefore, what follows is a statement of the facts adduced at trial. References to transcript page numbers therein refer to the trial transcript. Thereafter, we set out certain matters which transpired during voir dire which we believe pertinent to consideration of the questions presented herein.

## STATEMENT OF THE FACTS

### Trial Evidence

During the early morning hours of January 5, 1983, Debra Jean Sandefur was working as a night clerk/bookkeeper at the Los Cuartos Inn located at 1100 Highway 34 in Beckham County, Oklahoma (Tr. 563, 573). As Ms. Sandefur sat in the office balancing the books and making

the daily deposit, a young black man wearing a light gray windbreaker knocked at the door (Tr. 574). Ms. Sandefur got up, unlocked the door, opened it slightly and asked the young man if she could help him (Tr. 575). The man asked about the price of a room and Mrs. Sandefur responded that the price was $25.00 plus tax (Tr. 575). Because the young man hesitated for a moment, Ms. Sandefur referred him to the Royal Inn accross the street, which had lower rates (Tr. 575). The man smiled and stated that he would have to go and talk to his girlfriend and see if she wanted to spend the night anyway. Meanwhile, Ms. Sandefur thought it strange that she could hear a car running but could not see one.

Approximately ten minutes later, which was around 2:00 a.m., as Ms. Sandefur concluded her paper work and had closed the office door almost all of the way, she heard the door rattle as she was

walking toward the kitchen to eat her lunch (Tr. 576). The young man had returned. As he smiled and waved, Ms. Sandefur went and answered him through the closed door (Tr. 576). The man replied that his girlfriend wanted to stay and Ms. Sandefur then unlocked the door. As she walked back toward the front desk in the office, the man grabbed her from behind, placed his fist to her neck, poked her in the back and said, "This is a gun. If you don't do what I say I'll shoot you" (Tr. 577). He then added, "This is a hol-, this is a robbery. Do what I say or I'll shoot you." Although he had an object protruding out of his pocket, Ms. Sandefur did not actually see a gun (Tr. 577).

During the time that the man wearing the gray windbreaker was ordering Ms. Sandefur to do as he said, another man, whom Ms. Sandefur identified in court as the defendant (Tr. 618), entered the

office (Tr. 578). The defendant was dressed in black pants, a black shirt and he wore a black scarf on his head. After the man in gray had twice asked where was the money, the defendant stated to Ms. Sandefur, "You better tell the truth or I'll kill you" (Tr. 579).

Ms. Sandefur told the men that the money was in the back office, and as they went to get it they noticed that the door was partly closed and a light was on back there. Then they stopped and asked Ms. Sandefur if anyone was back there. After she assured the men that no one was in the back office, they became somewhat upset and warned her that she had better not be lying (Tr. 580).

When they reached the back office, Ms. Sandefur showed the men the file drawer containing the money bags and they ordered her to remove them (Tr. 582). After she complied with that demand, one of the men ordered her to get down on the

floor and keep her head down. As she followed this instruction, her glasses fell off. When she reached for them, the man in the gray jacket put his foot on the back of her head and ordered her to stay down or they would kill her (Tr. 582). As the men exited the office, the defendant again admonished Ms. Sandefur to keep her head down or else (Tr. 583).

Within a moment after they had exited the office, Ms. Sandefur heard someone hit the door leading to the cloakroom. As she moved her foot, one of the men yelled, "just stay down" (Tr. 585). At that time, Ms. Sandefur was somewhat puzzled as to how the men knew she had moved her foot until she observed them watching her through the window in the kitchen that looks into the kitchen (Tr. 585).

After hearing some movement at the door, Ms. Sandefur then heard three shots, which caused her to become more frightened because she could not

understand why the men shot since they had already frightened her enough (Tr. 586). However, she soon realized that someone had been shot (Tr. 568). Because the local police usually made rounds, she thought one may be involved. As she started to stand up, she heard more sounds and became more frightened (Tr. 587). The ensuing quietness increased her suspicion that a police officer had been shot (Tr. 587). To confirm that suspicion, she crawled to the office door, opened it, went to the counter area and peeked over the top. From her vantage point she observed the back of a police car, with the door open and an officer laying on the ground (Tr. 590). She did not see the two men, one of whom was the defendant (Tr. 590).

Ms. Sandefur then returned to the office, closed the door, called the police and reported the robbery and the shooting (Tr. 590). At the request of the

officer on the phone, Ms. Sandefur went to look at the officer who was shot (Tr. 591). She observed that he was bleeding from his head and she reported this to the dispatcher. Meanwhile, the other phones in the office started ringing. Despite the dispatcher's efforts to keep Ms. Sandefur on the phone for her safety, Ms. Sandefur attempted to aid the wounded officer who was lying on the ground, face down and breathing irregularly (Tr. 592-593).

Meanwhile, Elk City police officer James B. LaFarlette, along with several other police officers, responded to the call from Ms. Sandefur at approximately 2:08 a.m., three minutes after it was placed (Tr. 626-628). He and officer Clyde E. Davis, also from the Elk City Police Department, observed the wounded officer, Steven Mahan, lying facedown, bleeding profusely from his head and mouth (Tr. 631). Because the ambulance

had not arrived (Tr. 630), and because the wounded officer had stopped breathing and his pulse had stopped (Tr. 595), Officers LaFarlette and Davis decided to cancel the request for an ambulance and transport Officer Mahan to a hospital in one of the patrol units. Officer LaFarlette, accompanied by Ms. Sandefur, drove the wounded officer to the Elk City Community Hospital emergency room (Tr. 631).

While at the hospital, Officer LaFarlette learned that the wounded officer's service revolver was missing (Tr. 632). Officer LaFarlette checked the patrol unit, but did not find the missing gun. He then remained at the hospital until his comrade was transported by ambulance enroute to Oklahoma City (Tr. 634).

While enroute to Oklahoma City, the wounded officer lost his pulse and was taken instead to El Reno Hospital where

resuscitation efforts failed to revive him (Tr. 638-640). At approximately 5:40 a.m. that day, he was pronounced dead by Dr. Kenneth L. Preacher (Tr. 643). The doctor felt the wounded officer had died from gunshot wounds to the head (Tr. 644).

Meanwhile, Officer Davis secured the crime scene (Tr. 650-653). He and several other officers at the scene had received descriptions of the suspects. Another of the officers there began a search of the parking lot area for the suspects (Tr. 665).

The description from the dispatcher described one of the men as approximately five foot, eleven inches; wearing dark clothes, including a black shirt, black slacks and some type of black scarf around his head; and having a very thin face (Tr. 667). The other man was described as approximately five foot, eight to nine inches; wearing a gray quilted jacket having a shiny texture, dark slacks and

dark gloves (Tr. 667). This suspect was also described as wearing a goatee (Tr. 667). This dispatch was broadcasted to all police officers who were listening to their radio (Tr. 669).

One of the officers who received a call about the shooting of an officer and a robbery in Elk City was Mark Lumpkin, the patrol supervisor for the Clinton Police Department (Tr. 695-697). As a result, he assigned positions to each of the men on his shift to cover the exits from the freeway into Clinton from the West (Tr. 697). He and his partner took the exit at Interstate 40 and Highway 183 at the south side of town (Tr. 697-698).

At approximately 2:26 a.m. that same day, Officer Lumpkin observed a 1976 white Buick LaSabre with an unknown number of occupants coming from the west on Interstate 40 and exit on Highway 183 (Tr. 698-700). Because the vehicle had a defective tail light and an unsafe

windshield, he stopped it on a traffic violation (Tr. 698-701).

Upon stopping the vehicle, Officer Lumpkin observed the driver of the vehicle, whom the officer knew personally as Mitchell Henderson, jump out of the car from the driver's side and walk toward the officer (Tr. 702). However, at the officer's request, Henderson, who was wearing a gray jacket, stopped and remained in the car. At that time, Officer Lumpkin observed that there were two other occupants in the stopped vehicle (Tr. 702). Because the officer was very familiar with Henderson's reputation for carrying weapons, he requested the individual on the passenger's side to exit the stopped vehicle (Tr. 703). This individual was wearing a black shirt, black pants and shoes (Tr. 703). Because the door on the passenger's side was jammed, this individual exited from the driver's side.

As the second passenger exited the vehicle, Officer Lumpkin recalled the information previously given to him concerning the description of the suspects in the dispatch from Elk City (Tr. 704). He then advised the three men to place their hands on the car (Tr. 704). The three men were frisked, placed under arrest and read their Miranda rights. During this time several other police officers arrived on the scene as backup. When the man dressed in black clothing was frisked, Officer Lumpkin removed an unloaded Bauer .25 caliber automatic from the man's pocket. At trial, the officer identified the defendant as that individual (Tr. 706-708).

A search incident to that arrest resulted in the seizure of two brown bank bags identified as being similar to the ones taken from the Los Cuartos Motel (Tr. 581); a black jacket worn by the defendant; a gray jacket worn by

Henderson; a Smith and Wesson 66 stainless .357 Magnum, having the same serial number as that carried by Officer Mahan, the deceased; a loaded .25 caliber pistol and some marijuana found in the vehicle (Tr. 719-725).

The men were subsequently transported from Clinton to Beckham County where they were charged with Murder. Later that same morning around 4:00 a.m., the defendant made a taped statement after he had been fully advised of his constitutional rights (Tr. 882). Initially, he admitted the robbery, but denied having committed the murder. Rather, he claimed an unidentified individual appeared at the scene and killed the officer. However, when confronted with the accusation that he was lying, the defendant admitted shooting the officer (Tr. 915-919).

On the following day, the body of Officer Steven Mahan was transported to Oklahoma City where an autopsy was

subsequently performed (Tr. 942). The results of that autopsy revealed that Officer Mahan died from multiple gunshot wounds to the head (Tr. 954). The forensic pathologist recovered the three bullets. He also found gun powder residue in the wound tracks (Tr. 957).

The bullets removed from the victim's head were sent to the Oklahoma State Bureau of Investigation (O.S.B.I.) laboratory where ballistic tests confirmed that they were definitely fired from the weapon which was seized from the defendant at the time of his arrest (Tr. 937-940). At trial, the ballistics expert testified that, in his opinion, the officer was shot at a very close range, up to six inches. The basis for this conclusion rests on the fact that there was gun powder residue found in the wound track and the weapon in question would not leave residue at a distance of more than 24 inches (Tr. 942).

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Various items of clothing seized from the defendant and the co-defendants were submitted to O.S.B.I. laboratory for tests and comparisons. All of the shoes, including those worn by the defendant, were consistent with plaster casts of footprints made at the scene of the crime (Tr. 813-820).

In recreating the surrounding facts and circumstances which lead to the robbery of the Los Cuartos Inn and the murder of Officer Steven Mahan, who unexpectedly arrived at the scene, the State called numerous witnesses in its case-in-chief, including the two co-defendants whose memories had supposedly lapsed. The defense called no witnesses in its case-in-chief. Rather, the defense presented a motion for a directed verdict at the end of the State's case. When the motion was denied, the defense rested. After closing arguments, the jury returned verdicts of guilty on both counts.

During the punishment stage of the trial, the State presented evidence that the defendant had previously been involved in a robbery-homicide (Tr. 1030-1039). The defense presented the testimony of the brother of the defendant. The brother related how the seven siblings had grown up with the parents separating when the defendant was very young. The brother also testified that he had seen the defendant earlier on the night in question. The defense also presented the testimony of a minister who had met and counseled the defendant in jail.

After closing arguments and deliberation, the jury sentenced the defendant to death after finding five aggravating circumstances. These were: (1) the defendant knowingly created a risk of death to more than one person; (2) the murder was especially heinous, atrocious, or cruel; (3) the murder was committed

for the purpose of avoiding or preventing a lawful arrest or prosecution; (4) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (5) the victim was a law enforcement officer in the performance of his duties.

**Voir Dire of Juror Huling**

During the voir dire of Juror Huling, which forms the basis for defendant's argument herein, the prosecutor asked the juror whether, if he felt the circumstances appropriate, he could recommend a sentence of life in the penitentiary. The juror stated that he could. Joint Appendix (hereinafter J.A.) 17. The prosecutor next asked if Mr. Huling, because of the type of the crime, or because of something in the law or evidence that he found aggravating, could recommend a sentence of death. Mr. Huling answered in the affirmative (J.A.

17). Defense counsel during his voir dire, asked Mr. Huling to assume that he was sitting on the jury and the jury convicted the defendant of first degree murder and that the judge informed him of the law concerning the possibility of life imprisonment or a death sentence would the juror promise counsel that he could look at both alternatives. Mr. Huling answered "yes" (J.A. 18). Then, defense counsel asked Mr. Huling if just because he found him guilty he would not necessarily give him the death penalty. The juror answered yes (J.A. 18). Apparently surprised, defense counsel asked again if the jury found the defendant guilty then in the juror's own mind would he give him the death penalty and the juror answered yes. He answered that he would not consider anything else (J.A. 18). The juror told defense counsel that he had no notion in his mind whether or not the defendant was guilty (J.A.

19). Defense counsel challenged Mr. Huling for cause and that challenge was overruled. Thereafter, defense counsel excused Mr. Huling by exercising his sixth peremptory challenge (J.A. 19).

**Jurors accepted for cause by the defense.**

During the voir dire, defense counsel accepted or passed for cause each of the twelve jurors who sat on the trial jury. Juror Hammons (Tr. 86), Juror Scrivner (Tr. 124), Juror McCaskill (Tr. 155), Juror Tucker (Tr. 178), Juror Moore (Tr. 195-96), Juror West (Tr. 252), Juror Barker (Tr. 347), Juror Robertson (Tr. 356), Juror Jackson (Tr. 410), Juror Whitson (Tr. 425), Juror Scroggins (Tr. 438), and Juror Harrison (Tr. 475).

## SUMMARY OF THE ARGUMENT

This Court has repeatedly held that peremptory challenges are not of constitutional origin. Some members of this Court have suggested that peremptory challenges should be eliminated entirely

from criminal cases. While the Constitution surely secures the basic right to an impartial jury, it does not secure a right to peremptory challenges as an indispensible means to that end. Therefore, because Defendant passed for cause every juror who finally sat on his case, Defendant was given a constitutionally fair trial by "indifferently chosen" jurors.

The Oklahoma statutes allowing peremptory challenges do not create a substantial and legitimate expectation that a criminal defendant will not be deprived of life or liberty based upon the exercise of his peremptory challenges. Thus, the Fourteenth Amendment does not protect the statutory right to peremptory challenges. The Defendant and the state were each granted an equal number of peremptory challenges at trial and the trial court's ruling on Defendant's challenge of Mr. Huling was no more

"arbitrary" than any other spur-of-the-moment trial ruling. The proper focus of inquiry should be the impartiality of the jury finally seated, and not intermediate events leading up to the seating of the jury.

While we doubt that any constitutional error was committed during jury selection, if such error occurred it was harmless beyond a reasonable doubt Defendant's case was tried to an impartial jury and Defendant was ably represented by counsel. His factual guilt was fairly and reliably determined. Defendant received a .air trial, and that, rather than a perfect trial, is his constitutional due.

## PROPOSITION I

### PEREMPTORY CHALLENGES ARE NOT CONSTITUTIONALLY REQUIRED.

This Court has repeatedly held that peremptory challenges are not of constitutional origin. Gray v.

Mississippi, 481 U.S. ___, ___, 107 S.Ct. ___, 95 L.Ed.2d 622, 636 (1987) (citing Batson v. Kentucky, 476 U.S. ___, ___ (1986)); Swain v. Alabama, 380 U.S. 202, 219 (1965) and Stilson v. United States, 250 U.S. 583, 586 (1919). See also, United States v. Wood, 299 U.S. 123, 145 (1936) (citing Stilson, supra, "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress.").

Indeed, in his concurring opinion in Batson, supra, Justice Marshall argued for the complete elimination of peremptory challenges in criminal cases as the only means suitable for ending racial discrimination in jury selection. In doing so, Justice Marshall noted:

> But this Court has repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. Frazier v. United States, 335 U.S. 497, 505 n. 11 (1936); Stilson v. United States, 250 U.S. 533, 586 (1919); See also, Swain, supra, at 219.

Batson, supra, 476 U.S. at ___, 90 L.Ed.2d at 95. Justice Marshall based his suggestion for the elimination of peremptories in part upon the dissenting opinion of Justice Goldberg, (joined by Chief Justice Warren and Justice Douglas) in Swain v. Alabama, 380 U.S. 202, 244 (1965), in which Justice Goldberg argued that if it were necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former. Batson,

supra, 476 U.S. at ___, 90 L.Ed.2d at 94, Marshall, J. concurring.

Taking [as a given] the pronouncements of this Court and various of its Justices as establishing that the Constitution guarantees the right to trial by an impartial jury but does not guarantee the right to peremptory challenges we move to two of this Courts more recent pronouncements explaining, as nearly as is possible, the constitutional guarantee of an impartial jury. In Batson v. Kentucky, 476 U.S. ___, ___, 90 L.Ed.2d 69, 80-81 (1986), this Court stated:

> "The very idea of a jury as a body. . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder, supra, at 308, 25 L.Ed. 664; see Carter v. Jury Commission of Greene County, 396 U.S. 320, 330 (1970). The petit jury has ocupied a central position in our system of justice by safeguarding a

> person accused of crime against the arbitrary exercise of power by prosecutor or judge. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Strauder, supra at 309, 25 L.Ed. 664.

This Court has also recently stated:

> In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Lockhart v. McCree, 476 U.S. ___, ___, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137, 154-55 (1986).

It is plain on the face of this record that the defendant received a trial by jurors who were "indifferently chosen." Defense counsel passed each and every juror who heard the case for cause. Trial counsel did not request an additional peremptory challenge to replace the one used on Mr. Huling and did not complain to the trial judge that he had improperly been required to use a peremptory to excuse Mr. Huling. Trial counsel's only complaint about the jury was that it did not contain any blacks (J.A. 25). However, no complaint is made before this Court that blacks were improperly excluded from the venire or from the trial jury. Likewise, no argument is made here that the jury was not selected from a fair cross-section of the community. This jury is entitled to the presupposition of impartiality because it was chosen from a fair cross-section of the community, each and every

juror unobjected to by the defense, and because the jurors could conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case. Lockhart, supra, 90 L.Ed.2d at 154-55.

The statutory right to exercise peremptory challenges is certainly an important means to the constitutionally required end of a fair and impartial trial. However, it is the end of impartiality that the Constitution requires, not the means of peremptory challenges. Defendant's proposed rule would serve to constitutionalize each and every means employed toward that worthwhile end, whether or not the end was actually achieved in a given case.

> This Court has long held that "'[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." Brown v. United States, 411 U.S. 223, 231-232 (1973), quoting Burton v. United States, 391 U.S. 123, 135

(1968), and Lutwak v. United States, 344 U.S. 604, 619 (1953).

McDonough Power Equipment v. Greenwood, 464 U.S. 548, 553 (1984). The defendant cannot say, and has not argued before this Court, that he was denied the "touchstone of a fair trial", meaning an impartial trier of fact meaning a jury capable and willing to decide the case solely on the evidence before it. Id. 464 U.S. at 554. He had a free and unhampered voir dire permitting him to examine each juror for possible biases, known and urknown, and, when his challenge for cause was overruled exercised one of his peremptory challenges to strike Juror Huling.

It is arguable that Juror Huling should have been stricken for cause. However, Juror Huling's responses regarding his ability to vote for either a life sentence or the death penalty were ambiguous. He informed both the

prosecutor and the defense lawyer that he could consider either punishment. Then, unaccountably, he told the defense attorney that he would consider only the death penalty should the defendant be convicted. The better course might have been for defense counsel or the trial judge to inquire further of Mr. Huling to clear up this confusion.

However, while Mr. Huling's state of mind was ambiguous, one thing was not. The twelve jurors who sat on the defendants case were unambiguously passed for cause by defense counsel. He was thus given a trial by jurors "indifferently chosen" who could hear the evidence and do their duty according to law. No improper juror sat in the defendant's case and no proper juror was wrongly excluded. The right to challenge is the right to reject, not to select a juror. Ex Parte Spies, 123 U.S. 163, 168 (1887). If from those who remain an impartial

jury is obtained the constitutional right of the accused is maintained. Id. 123 U.S. at 168. Therefore, the inquiry is confined to rulings on challenge to jurors who actually sat at trial. Id. 123 U.S. at 168. Therefore, the defendant received the impartial jury trial which is at the heart of the Sixth Amendment guarantee.

Some language in Swain v. Alabama, 380 U.S. 216, 219 (1965), states that the denial or impairment of the right to peremptory challenges is reversible error without a showing of prejudice citing three earlier cases from this Court. Two of those cases were federal prosecutions and the third was a civil case. None rested on constitutional grounds. First, Lewis v. United States, 146 U.S. 370 (1892), reversed a conviction in which the defendant was not permitted to be physically present with the jurors while exercising his peremptory challenge and was required to exercise those challenges

without knowledge of which jurors had been challenged by the prosecution. Second, in Harrison v. United States, 163 U.S. 140 (1896), this Court reversed a conviction in which the defendant was not permitted to exercise the number of peremptory challenges required by statute. Finally, the Swain court relied upon Gulf, Colorado and Santa Fe Railway Co. v. Shane, 157 U.S. 348 (1895), in which the statutory provision for exercising peremptory challenges was violated when the trial court followed a contrary local rule or practice. We respectfully submit that nothing in these three older cases, or in Swain itself, undercuts the oft repeated pronouncements, reaffirmed only recently, that peremptory challenges are not of constitutional origin. Indeed, Swain itself recognized that peremptory challenges are not constitutionally required. Id. 380 U.S. at 219. Simply

stated, a practice may be widely, even universally, employed and still not be enshrined in the Constitution as the fundamental law of the land.

## PROPOSITION II

### DEFENDANT WAS NOT DEPRIVED OF DUE PROCESS HEREIN.

The Defendant concedes that this Court has never held peremptory jury challenges to be guaranteed by the Constitution. The Defendant conspiciously omits to include in his brief the authority cited above which directly holds that peremptory challenges are not constitutionally required. However, recognizing that this Court has never held peremptory jury challenges guaranteed by the Constitution, Petitioner argues that the Oklahoma statutes providing for peremptory challenges create an interest in life or liberty that is protected by the Due Process Clause of the Fourteenth

Amendment. The Defendant relies principally on Hicks v. Oklahoma, 447 U.S. 343 (1980).

That case is readily distinguishable, however. In Hicks the defendant was tried and convicted of unlawfully distributing heroin after two former convictions for two felonies. Id. 447 U.S. at 344. After Hicks received a 40 year sentence, the habitual offender statute under which he had been sentenced was declared unconstitutional by the Oklahoma Court of Criminal Appeals. Therefore, Hicks sought to have his 40 year sentence set aside in view of the unconstitutionality of the sentencing provision. Id. 447 U.S. at 345. The Oklahoma Court of Criminal Appeals declined to set the sentence aside reasoning that Hicks was not prejudiced by the impact of the invalid statute because his sentence was within the range of punishments that could have been

imposed in any event. This Court granted certiorari to consider Hicks' contention that the state had deprived him of due process of law guaranteed to him by the Fourteenth Amendment. Id. 447 U.S. at 345.

In reversing the Oklahoma Court of Criminal Appeals decision, this Court noted that by statute in Oklahoma a convicted Defendant is entitled to have his punishment fixed by a jury. Id. 447 U.S. at 345. Because if the jury had been properly instructed, they could have imposed any sentence of "not less than 10 years", this Court found the possibility that the jury would have returned a sentence of less than 40 years was substantial. Id. 447 U.S. at 346. The Court went on to hold that Hicks had a substantial and legitimate expectation that he would be deprived of his liberty only to the extent determined by the jury in the exercise of his statutory

discretion and that expectation was a liberty interest preserved by the Fourteenth Amendment against arbitrary deprivation by the state. Id. 447 U.S. at 346. In consequence, the Court found that the right to have a jury fix the sentence in the first instance is determinative, at least as a practical matter, of the maximum sentence that a defendant will receive. Id. 447 U.S. at 347. Because the state appellate court had not proported to reconsider the appropriateness of the 40 year sentence but had simply affirmed the sentence, the State had deprived the defendant of liberty without due process of law. Id. 447 U.S. at 347.

We believe the crucial distinction between this case and Hicks lies in the fact that the defendant Hicks was sentenced by an improperly instructed jury which, if properly instructed, could have given a substantially shorter

sentence. Thus, his elemental physical liberty was potentially at stake for an indeterminate but substantial period of years. The Defendant in the pr sent case did not have such a "substan al and legitimate expectation" that his g ilt or punishment would be affected by the exercise of one peremptory challenge. Thus, the statutory provision of peremptory challenges does not create the sort of liberty interest protected by the Fourteeth Amendment. If the contrary were true, we suggest this Court would not have repeatedly and recently pronounced that peremptory challenges were not of constitutional origin, because the various state and federal statutes governing their exercise would have already have been deemed to create "liberty interest" protected by the Fourteenth Amendment.

Defendant's argument is nothing less than an invitation to declare, piecemeal, each and every provision of criminal

procedure to be constitutionally required. It is an invitation which we respectfully suggest this Court should decline. Once the Court embarked on such a road it would be confronted with ever multiplying and endless litigation over the constitutional ramifications of trial procedures heretofore thought only to be matters of state concern. We could see no principled reason why the trend would not spill over to constitutionalize the Federal Rules of Criminal Procedure as well. The distinction between constitutional law as the limited body of fundamental values of our society and procedural law would be blurred and the fundamental law of the land would be hopelessly trivialized. Such a result is neither desirable nor necessary.

We must also take issue with the Defendant's repeated assertion that he was "arbitrarily" deprived of a peremptory challenge. The trial judge's

ruling on the challenge for cause for Juror Huling was no more "arbitrary" than any spur-of-the-moment ruling required from any trial judge. Mr. Huling had given contradictory answers to the same questions. As noted above, Mr. Huling told the prosecutor that he could consider both a life sentence and the death penalty if the defendant were convicted. He initially told the defense counsel the same thing. Then, unaccountably, Mr. Huling told defense counsel he would only consider the death penalty. The trial judge, better able to view Mr. Huling's manner and demeanor than can we on the cold paper record, may have been convinced that Mr. Huling was merely confused. Having told both the prosecutor earlier that he could consider both appropriate sentences it is not unreasonable to conclude that Mr. Huling became confused by defense counsel's continued questioning. However, assuming

the Defendant's view of the facts, he exercised a peremptory challenge and excluded one juror he truly needed to exclude. In a sense, it was the best spent peremptory challenge that was used.

We also must disagree with the Defendant's characterization that he lost a peremptory challenge by operation of an "established state procedure" within the meaning of Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). First, this argument presupposes incorrectly that criminal defendants have a constitutional right to peremptory challenges. Because no such right exists, there is no constitutional requirement of due process before that right is affected. We assume the result sought by the Defendant would be notice and an opportunity to be heard before a criminal defendant could be "improperly deprived" of a peremptory challenge during voir dire. Such a result borders on the absurd and ignores the fact that

both the Defendant and his trial counsel were present before the court when it ruled on the challenge for cause of Mr. Huling. Any necessary argument could have been made at that time to give the Defendant the "process" that was due before requiring him to use a peremptory challenge.

We are very uncomfortable at the process of the wholesale importation of the civil rights law under 42 U.S.C. § 1983 into capital criminal litigation. We believe it would be unnecessary and inadvisable to place an overlay of § 1983 law on top of the already well established principles of criminal procedure. However, in order to meet the Defendant's arguments based on Logan v. Zimmerman Brush Co., supra, we offer these brief comments. The "established state procedure" argument of the Defendant only makes sense if we assume that it is the "established state

procedure" to improperly deny challenges for cause and then require use of a peremptory challenge. This is manifestly not the case. While we are unwilling to concede that the trial judge's ruling on the challenge for cause was <u>constitutional</u> error rather than error in the common law of peremptory challenges, if it were such constitutional error it would manifestly not be "established state procedure." Quite the contrary, it would be an error resulting from the unauthorized failure of the trial judge to follow the established state procedure, to-wit, the correct granting of challenges for cause. It would certainly not be practical for the State of Oklahoma to provide notice and a predeprivation hearing before a trial judge made an incorrect ruling. However, the state did provide some process whereby the alleged error could be corrected. First, trial counsel could have further

argued the matter immediately. Secondly, under this theory the constitutional error would be the improper seating of an unqualified juror. To correct this mistake the state did have a "post-deprivation" procedure in the statutory provision establishing peremptory challenges. Thus, the Defendant had at his disposal, and did use, the procedure to correct the arguably erroneous ruling on the challenge for cause. Therefore, under Parratt v. Taylor, 451 U.S. 527, 542-43 (1981), there was no deprivation "without due process of law" because the "state action" in the judge's arguably erroneous ruling on the challenge for cause was not complete until after the Defendant had used the remedial process of the peremptory challenge. Again, with some reluctance to see due process principles which really do not "fit" imposed upon criminal procedure, we note that the court has recently held that

historically the guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property. Daniels v. Williams, 474 U.S. ___, ___, 106 S.Ct. ___, 88 L.Ed.2d 662, 668 (1986). In that case the court held that history reflects the tradition and common sense notion that the due process clause was intended to secure the individual from the arbitrary exercise of the powers of government and to serve to prevent governmental power from being used for purposes of oppression. Id. 474 U.S. at ___, 88 L.Ed.2d at 668. In a companion case the court reiterated that the due process clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property and that such lack of due care, even where leading to serious injury, does not approach the sort of abusive government conduct that

the due process clause was designed to prevent. Davidson v. Cannon, 474 U.S. ___, ___, 106 S.Ct. ___, 88 L.Ed.2d 662, 682 (1986).

It cannot be argued that the trial judge's ruling on the challenge for cause of Mr. Huling was intentional conduct, abusive governmental action, or the use of governmental power for the purposes of oppression. It was simply a trial ruling and nothing more. Therefore, if we are forced to import the broader law of due process into the specific needs of criminal procedure, we must suggest that the allegedly incorrect trial ruling, being "negligent" at worst, did not violate the due process clause. However, we respectfully suggest that the door opened by Defendant in reliance upon Logan v. Zimmerman Brush Co., supra, should remain firmly closed. To cross that threshold would be to enter a realm frought with confusion and uncertainty in

circumstances under which litigants most need to know what the rules are.

Likewise, the Defendant's reliance on Wardius v. Oregon, 412 U.S. 470 (1973), is misplaced. The facts of this case do not present the Court with an established statutory scheme in which the prosecution enjoys a nonreciprocal benefit over the defense. The facts giving rise to this appeal arose from the use of one of nine peremptory challenges granted by the state to the defendant. Both the state and the defendant began the voir dire with an equal number of challenges. The defendant used all of his challenges while the state waived certain of its peremptories. This is a case in which the litigants clearly "started even" and proceeded to the selection of an impartial jury which conducted a fair trial.

The Defendant next argues that, by granting an impartial jury only at the cost of impairing defense peremptory

strikes, Oklahoma unlawfully penalized the exercise of his Sixth and Fourteenth Amendment rights. We read in this argument the implicit concession that the Defendant was granted an impartial jury. Nothing in his argument shows to the contrary. This argument is a curious one which seems to have the cart before the horse. The purpose of peremptory strikes is to secure an impartial jury. But this Court has repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. Batson, supra, 476 U.S. at ___, 90 L.Ed.2d at 95, Marshall, J. concurring. Thus, while conceding that he was granted an impartial jury the Defendant complains that the cost of that jury was the exercise of a peremptory challenge. But if we understand much of the Defendant's argument correctly, it is

clear that the purpose of the peremptory challenge is to secure an impartial jury and a fair trial. Unlike the cases relied upon by the Defendant, the State of Oklahoma has not conditioned the exercise of a constitutional right, herein an impartial jury and a fair trial, upon the acceptance of an unfair burden. Nor does it improperly cut down on the privilege of an impartial jury by making the assertion of that privilege costly. The only purpose for peremptory challenges is to fulfill the goal of an impartial jury and a fair trial. Having essentially conceded the impartiality of the jury by accepting each member of the jury for cause, and making no serious argument herein that the jury was biased against him, there can be no ground for claiming that the Defendant herein has been denied a fair trial.

## PROPOSITION III

**ANY ERROR HEREIN IS HARMLESS BEYOND A REASONABLE DOUBT.**

Our approach to this case has been that the jury which actually sat to convict and sentence the Defendant was an impartial jury which gave the Defendant a fair trial within the meaning of the Sixth and Fourteenth Amendments. We believe the use of the peremptory challenge (authorized by statute and not required by the Constitution) to exclude Mr. Huling from the jury effectively insured a jury which consisted of twelve jurors passed by the Defendant for cause. Therefore, no constitutional error was committed in the selection of the Defendants' jury.

We offer the following comments to demonstrate, if necessary, that any constitutional error in the selection of the jury is harmless beyond a reasonable doubt. The Defendant in the present case robbed a motel in western Oklahoma. When a police officer arrived at the scene as a part of a routine patrol the Defendant

somehow overpowered and disarmed the officer. Then, rather than merely incapacitating or taking the officer hostage, the Defendant shot the officer in the head three times

mortally wounding him. The Defendant was captured within minutes of the murder still in the company of his criminal accomplices. After his arrest, the police found Officer Mahan's pistol in the Defendant's possession, along with money bags consistent with those stolen from the scene of the murder. Finally, after being informed of his rights the Defendant the admitted his participation in the crime. The case against him was so damning that the Defendant does not bother to argue his factual innocence before this Court.

Strictly speaking, the court below did not rely upon the harmless error doctrine in resolving this issue. The Court of Criminal Appeals stated that it

was error (not explicitly stated to be constitutional error) to fail to remove a prospective juror who unequivocally states that he is unwilling to follow the law during the penalty phase by considering a life sentence. However, the Court also stated that there was nothing in the record to show that any juror who sat at the trial was objectionable there was no ground for reversible. Ross v. State, 717 P.2d 117, 120 (Okl.Cr.App. 1986). We read the language of the court below to mean, as we have suggested, that in cases in which the jury finally impaneled is unobjectionable, unbiased, and can give the Defendant a fair trial there is no constitutional error. However, because the Defendant has couched his argument before this Court in terms of the harmless error doctrine, we will do the same.

The Defendant relies heavily on Gray v. Mississippi, 481 U.S. __, 107 S.Ct.

___, 95 L.Ed.2d 622 (1987). In that case the trial court erroneously excluded for cause a juror who should have been seated under Witherspoon v. Illinois, 391 U.S. 510 (1968). Gray, supra, 481 U.S. at ___, 95 L.Ed.2d at 631-32. Despite this error, the Mississippi Supreme Court affirmed the resulting conviction because it believed the trial court was correcting its own error in earlier refusing to excuse for cause jurors unequivocally opposed to the death penalty. Id. 481 U.S. at ___, 95 L.Ed.2d at 632. This Court agreed that the excluded juror was clearly qualified to be seated under the law. Id. 481 U.S. at ___, 95 L.Ed.2d at 633. This Court rejected the two analyses suggested to affirm the judgment of the Mississippi Supreme Court. The first such analysis was to consider the state's retention of unexercised peremptory challenges at the end of jury selection as an indication

that the erroneous for cause exclusion was harmless because the state represented that it would have removed the venire by peremptory challenge if the court had denied its for cause motion. The second theory was to treat the erroneous exclusion as an isolated incident without prejudicial effect if it could not be said that the ultimate panel did not fairly represent the community. Id. 481 U.S. at ___, 95 L.Ed.2d at 634-35. In essence, this Court decided Gray on the basis of the jury that was seated and not on the basis of the jury that might have been seated, sensibly declining to enter into speculation regarding what might have happened if challenges for cause or peremptory challenges had been differently employed.

Unaccountably, the Defendant herein appears to follow in the footsteps of the argument put forward by Mississippi in Gray. The Defendant herein argues that

had Juror Huling been dismissed for cause, the defense would have had an additional peremptory challenge, the exercise of which might have changed the composition of the jury. In making this argument, the Defendant makes a foray into the realm of the hypothetical. Trial counsel did not attempt to exclude another juror by peremptory challenge or ask for an additional peremptory challenge for that purpose. Nothing in the record of the jury selection indicates that trial counsel wished to peremptorily strike another juror. Curiously, the argument that the sixth peremptory could have been used on another juror undercuts the supposed tactical advantage of waiving the last peremptory. Brief at 18, n. 9.

In any event, unlike in Gray, the trial court in the present case did not exclude a juror who should have been seated. Likewise, the trial court did not

seat a juror who should have been excused. No juror was improperly seated and no juror was improperly excluded. Thus, there was no error in the composition of the final jury. Therefore, the "relevant inquiry" of Gray, that is whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error, need not be asked here. See Gray, supra, 481 U.S. at ___, 95 L.Ed.2d at 637.

This Court recently held that jury instructions violating the principles of Sandstrom v. Montana, 442 U.S. 510 (1979), may be harmless error in Rose v. Clark, 478 U.S. ___, 106 S.Ct. ___, 92 L.Ed.2d 460 (1986). In that case this Court stated:

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the

> conduct of criminal trials is to ensure that those trials lead to a fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitled a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. at ___, 89 L.Ed.2d 674, 106 S.Ct. 1431; United States v. Hastings, supra, at 508-509, 76 L.Ed.2d 96, 103 S.Ct. 1974.

Id. 478 U.S. at ___, 92 L.Ed.2d at 47[illegible]. This case is clearly entitled to the strong presumption that any other errors at trial are subject to harmless error anlysis. The Defendant herein was represented by capable counsel and was tried to an impartial jury, each and every member of which had been passed for cause. To say the very least, the record developed at trial establishes guilt beyond a reasonable doubt. Therefore, the interest in fairness enjoyed by the

Petitioner has been satisfied and the judgment should be affirmed.

In Rose this Court listed its previous cases which had applied the harmless error doctrine:

> In Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 ALR 3d 1065 (1967), this Court rejected the argument that errors of constitutional dimensions necessarily require reversal of criminal convictions. And since Chapman, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. ___, ___, 86 L.Ed.2d 674, 106 S.Ct. 1431 (1986). That principle has been applied to a wide variety of constitutional errors. E.g., Id., at ___, 89 L.Ed.2d 674, 106 S.Ct. 1431 (failure to permit cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114, 118, 78 L.Ed.2d 267, 104 S.Ct. 453 (1983) (per curiam) (denial of right to be present at trial); United States v. Hasting, 461 U.S. 499, 508-509, 76 L.Ed.2d 96, 103 S.Ct. 1974 (1983) (improper comment on defendant's failure to testify); Moore v. Illinois, 434 U.S. 220, 232, 54 L.Ed.2d 424, 98 S.Ct. 458 (1977) (admission of witness identification obtained in violation of right to

> counsel); Milton v. Wainwright, 407 U.S. 371, 33 L.Ed.2d 1, 92 S.Ct. 2174 (1973) (admission of confession obtained in violation of right to counsel); Chambers v. Maroney, 399 U.S. 42, 52-53, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970) (admission of evidence obtained in violation of the Fourth Amendment). See also, Hopper v. Evans, 456 U.S. 605, 613-614, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982) (citing Chapman, and finding no prejudice from trial court's failure to give lesser-included offense instruction).

Id. 478 U.S. at ___, 92 L.Ed.2d at 469-70. Errors which could never be considered harmless are those which either aborted the basic trial process or denied it altogether. Id. 478 U.S. at ___, 92 L.Ed.2d at 470 n. 6. Clearly, any error found in the present case is not one which aborted the basic trial process or denied it altogether. Instead, any error of the trial court which improperly required the use of a peremptory challenge to exclude Mr. Huling is less serious than an error which, as in Rose itself, left the entire jury incorrectly

instructed on the burden of proving malice. Also, like the erroneous malice instruction in Rose, and unlike such errors as judicial bias or denial of counsel, any error regarding the use of the peremptory challenge herein did not affect the composition of the record and thus require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Id. 478 U.S. at ___, 92 L.Ed.2d at 471, n. 7.

In the present case, the Defendant robbed a motel at gunpoint and then needlessly summarily executed a police officer by shooting three rounds into the officer's head. The proof of guilt was crushing and the jury found five aggravating circumstances to support the death penalty. We are mindful that this Court has recently stated:

> The harmles-error doctrine recognizes the principle that the

> central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, United States v. Nobles, 422 U.S. 225, 230, 45 L.Ed.2d 141, 95 S.Ct. 2160 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error, 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridcule it.").

Delaware v. Van Arsdall, 475 U.S. ___, at ___, 106 S.Ct. ___, 89 L.Ed.2d 674, 684-85 (1986). The factual question of the Defendant's guilt herein was fairly and reliably found. The Defendant does not even bother to argue before this Court that the jury which convicted him was in some way biased. Under these circumstances, reversal of this case for the handling of a single peremptory challenge to a juror would be precisely the sort of decision which "bestirs the public to ridicule" to the judicial

process. Neither the Constitution nor considerations of elementary justice require such a result.

## CONCLUSION

For reasons set out above, we respectfully ask the Court to affirm the judgment of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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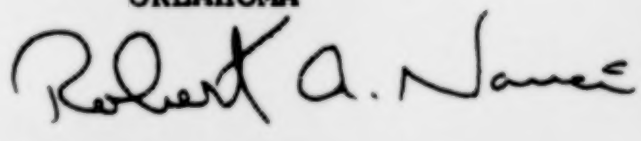
ATTORNEY GENERAL OF
OKLAHOMA



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# REPLY

# BRIEF

FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-5309

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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BOBBY L. ROSS,

*Petitioner,*

v.

OKLAHOMA,

*Respondent.*

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**On Writ Of Certiorari To The Court Of Criminal Appeals Of Oklahoma**

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## REPLY BRIEF OF PETITIONER

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## ARGUMENT

### A. In Concluding That the Petitioner Has Received Due Process of Law, the State Has Misconstrued Both the Fourteenth Amendment and Oklahoma Law.

The Petitioner has contended that the deprivation of one of his statutory peremptory challenges violated the Due Process Clause of the Fourteenth Amendment. In response, the State has argued that the Due Process Clause guarantees the Petitioner nothing more than an impartial jury. Since the Petitioner did not challenge any of the actual trial jurors for cause, the State concludes that the Petitioner had such an impartial jury. Thus, according to the State, the loss of a peremptory challenge did not harm the Petitioner, and the Due Process Clause was not violated (Respondent's Brief at 30-31, 37).

The State's argument is flawed in two regards. First, the State has misconceived the purpose of peremptory challenges under Oklahoma law. Second, the State has misconstrued the protection conferred by the Due Process Clause of the Fourteenth Amendment.

#### 1. The Right of Peremptory Challenge Was Not Extinguished by Impaneling Jurors Who Were Unchallenged for Cause.

The State argues that because the Petitioner "passed" the jurors who actually sat on his trial "for cause", he "essentially conceded the impartiality of the jury . . . ." According to the State, an additional peremptory challenge therefore would have been valueless, since the "purpose" of peremptory challenges had been achieved once such an "impartial" jury was seated (Respondent's Brief at 48). We disagree.

Without citation of authority, the State has equated an "impartial jury", guaranteed by the Sixth and Fourteenth Amendments, with a jury whose members have not been successfully challenged for cause (Respondent's Brief at 21, 30). The State's "impartial" jury may include members who are biased, but who have not been removed for cause because their biases were not detected by responses to *voir dire* or other

evidence. If a jury includes such biased members, even though they go unchallenged for cause, it is not the impartial jury required by the Constitution. See *Reynolds* v. *United States*, 98 U.S. 145, 157 (1878) ("If a positive and decided opinion had been formed [by a juror], he would have been incompetent even though it had not been expressed"). The State's definition of impartiality is not a sufficiently rigorous one.

Because challenges for cause cannot assure removal of every biased juror, the Petitioner's counsel did not "essentially concede" the impartiality of the jurors by failing to challenge them for cause. Indeed, the implicit "concession" perceived by the State was expressly negated by defense counsel's objection that "the defendant feels he's denied a fair and impartial trial by his peers" (J.A. 25). By "passing" the trial jurors "for cause", the Petitioner's counsel merely declined to offer specific proof of juror bias.

The fact that juror bias may not be detected by responses to *voir dire* underscores the importance of peremptory challenges in the Oklahoma scheme of jury selection. The Petitioner's peremptory challenges could be used to remove biased jurors whose biases could not be proven, and to remove other jurors who, even if unbiased, were expected to be less receptive to the defense case. By "passing" the actual trial jurors "for cause", the Petitioner's counsel did not waive the right to exercise peremptory challenges against those jurors. Indeed, seven of the Petitioner's peremptory challenges were used against jurors who previously had been "passed for cause" by the Petitioner's counsel (Tr. 34, 52, 227, 265, 276, 301, 315, 348, 356, 378, 425, 439; J.A. 24).

Another peremptory challenge, made available if Mr. Huling had been excused for cause, could have altered the composition of the Petitioner's jury. The State nevertheless contends that such an additional strike would have had no importance because the actual trial jurors were "passed for cause" (Respondent's Brief at 48). As viewed by the State, a peremptory challenge is merely another form of challenge for cause,



which loses all significance as soon as twelve persons, unchallenged for cause, are seated in the jury box. The State's view is unsupported by Oklahoma's statutes.

Under Oklahoma law, a peremptory challenge can be exercised only after any challenges for cause against a juror have been disallowed, Okla. Stat., Tit. 22, § 693 (1981), and only when the "jury is full . . . ." Okla. Stat., Tit. 22, § 653 (1981). Thus, under the Oklahoma statutory scheme, a peremptory challenge is not a substitute for a challenge for cause, because jurors challengeable for cause will be removed before the time ever comes to use peremptory challenges. The right of peremptory challenge is not extinguished by impaneling twelve jurors, unchallenged for cause. On the contrary, the seating of twelve jurors, unchallenged for cause, is only the starting point for exercise of peremptory strikes under Oklahoma's law.

As contemplated by the Oklahoma legislature, the purpose of peremptory strikes is not to impanel a jury unchallenged for cause, but to select which prospective jurors, among those unchallenged for cause, are to decide a defendant's fate. The purpose of peremptory challenges is achieved only by granting a defendant the full number of peremptory strikes authorized by law, and by permitting the free exercise of these strikes. In this case, the Petitioner lost the benefit of one of his peremptory strikes; this loss was not cured by trying the Petitioner before jurors who were not challenged for cause.

**2. When State Law Guarantees Peremptory Challenges, the Due Process Clause Assures More Than a Jury Unchallenged For Cause.**

Much of the State's argument in this Court is founded on a single assumption, which it fails to support with citation of authority. This assumption is that the Fourteenth Amendment offers only one protection to the Petitioner under the circumstances of this case: an "impartial" jury, defined as one having no members challenged for cause (Respondent's Brief at 21, 25). In advancing this argument, the State ignores the lan-

guage of the Fourteenth Amendment itself: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." When State law protects the right of peremptory challenge, as in Oklahoma, the Due Process Clause guarantees more than a jury unchallenged for cause.

The Petitioner is a "person." He has been sentenced both to death and to a term of imprisonment. If the judgment of the trial court is upheld, he will be "deprived" of both his "life" and his "liberty" by a "State." A statute enacted by the Oklahoma legislature guaranteed the Petitioner nine peremptory challenges during his trial; this statute is a "law." Nine challenges were "due" to the Petitioner under that "law." The Petitioner was denied one of these nine challenges through the trial court's error, and thus did not receive the "process" that he was "due" under the "law." If the State imprisons and executes the Petitioner after denying him a peremptory challenge, it will have deprived him of his life and liberty without due process of law—even if no members of his jury were challenged for cause. Such a conclusion does not "hopelessly trivialize" the "fundamental law of the land", as the State urges at page 38 of its Brief: it merely gives effect to the language of the Fourteenth Amendment.

This case is indistinguishable from *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980). That case, like this one, involved deprivation by a trial court of a criminal defendant's State-created procedural right. In *Hicks*, a trial court error denied a defendant his right to jury sentencing. Even though the "process of law" embodied in the right to jury sentencing was purely of State origin, this Court found that its deprivation denied due process of law within the meaning of the Fourteenth Amendment. Under *Hicks*, the "law" of "due process of law" can be a State law.[1] Even though no jurors are challenged for cause, denial of

[1] See also *Hurtado* v. *California*, 110 U.S. 516, 535 (1884) ("Due process of law in the [Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress . . . . In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . ."); *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1880) ("The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies . . . . Each State prescribes its own modes of judicial proceeding"); *Walker* v. *Sauvinet*, 92 U.S. 90, 93 (1875) ("Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State").



a State-created right, such as a peremptory challenge, can deny due process of law under the Fourteenth Amendment.[2]

The State has attempted to distinguish this case from *Hicks* by arguing, without citation of authority, that the *Hicks* defendant's right to sentencing by a jury was a "substantial and legitimate expectation", while the right to peremptory challenge was not (Respondent's Brief at 35, 37). In light of this Court's characterization of the right of peremptory challenge as "one of the most important of the rights secured to the accused", *Pointer* v. *United States*, 151 U.S. 396, 408 (1894), there can be no question that this right is a "substantial" one. The right to peremptory challenge, which is expressly and unconditionally guaranteed to criminal defendants by Oklahoma statute, is a "legitimate" right as well. Like the right to jury sentencing in *Hicks*, the right of peremptory challenge is a "substantial and legitimate expectation."

The State also seeks to distinguish *Hicks*, again without citation of authority, by arguing that an incorrect jury instruction (as in *Hicks*) "could" influence the outcome of a case while a

[2] The Petitioner's peremptory challenge was denied as a result of State compulsion—by the State trial judge's denial of the challenge for cause, which forced the use of a peremptory challenge on Mr. Huling. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 170-71 (1970) (private action compelled by State law held State action).

change in jury membership (resulting from use of an additional peremptory challenge) could not (Respondent's Brief at 36-37). Common sense dictates otherwise, most notably on the issue of punishment for first degree murder; since a life sentence is mandatory upon jury disagreement under Okla. Stat., Tit. 21, § 701.11 (1981), a change in the vote of a single juror, from death to life, will change the penalty outcome from death to life. Moreover, the State's argument is inconsistent with empirical evidence, which indicates that changes in a jury's membership, brought about by exercise of peremptory challenges, can influence a case's outcome.[3]

The State's argument that the right of peremptory challenge is not outcome-determinative is also inconsistent with the decisions of this Court. These decisions have repeatedly declined to presume that a constitutionally selected jury would have decided a matter in the same way as did an unconstitutionally selected jury.[4] In effect, selection procedures which affect a jury's composition (like the peremptory challenge in this case) have been presumed to be outcome-determinative. This case therefore cannot be distinguished from *Hicks* on the basis of the outcome-determinativeness of the State-created right in

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[3] Zeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 Stan. L. Rev. 491 (1978).

[4] *Gray* v. *Mississippi*, ___ U.S. ___, 107 S. Ct. 2045, 2051-56 (1987); *Batson* v. *Kentucky*, 476 U.S. ___, 106 S. Ct. 1712 (1986); *Turner* v. *Murray*, 476 U.S. ___, 106 S. Ct. 1683 (1986). See also *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (Marshall, Brennan, Blackmun and Stevens, JJ.) ("when a petit jury has been selected upon improper criteria . . . we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Peters* v. *Kiff*, 407 U.S. 493, 504 (1972) (Marshall, Douglas and Stewart, JJ.) ("there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case"); *Cassell* v. *Texas*, 339 U.S. 282, 301-02 (1950) (Jackson, J., dissenting).



question: the State-created right in this case may well influence the outcome of a trial.

In arguing that the Due Process Clause has not been violated, the State has also asserted that constitutional errors caused by a State official's negligence never deny due process of law, and that the trial judge's action in this case was "'negligent', at worst" (Respondent's Brief at 44-45). We cannot accept this argument.

To support its contention, the State has cited *Daniels* v. *Williams*, 474 U.S. 327 (1986) and *Davidson* v. *Cannon*, 474 U.S. 344 (1986), cases involving out-of-court bodily injuries caused by negligence of State officials, in which the officials' actions were held not to offend the Due Process Clause. The rationale of these decisions has no application to a State-sponsored criminal trial, the whole purpose of which is to make an intentional decision on whether to deprive a person of life and liberty. When a person is intentionally deprived of life and liberty as a result of a State criminal trial, the Fourteenth Amendment is violated if due process of law was denied in that trial, even if the denial was caused by a State official's negligence.

"Due process means . . . a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). The Fourteenth Amendment violation in this case would be aggravated, rather than excused, if it was caused by the trial judge's negligence.

### B. The State Has Failed to Establish That the Constitutional Violation Was a Harmless One.

There are two possible approaches which the State might take in order to establish that the constitutional error in this case was harmless. First, the State might attempt to show, beyond a reasonable doubt, that a differently composed jury would have reached the same results as the Petitioner's actual jury. Second, the State might attempt to show, beyond a rea-

sonable doubt, that the constitutional error would not have affected the composition of the Petitioner's actual jury. The State has failed to sustain its burden under both theories.

**1. A Differently Composed Jury Could Have Made Different Determinations of Guilt and Sentence.**

In addressing the harmless error issue in this case, the State has contended that its case against the Petitioner was "damning" and "crushing" (Respondent's Brief at 50, 59). In so arguing, the State appears to be inviting this Court to find that, if the Petitioner's jury had been differently composed, the differently composed jury would have reached the same results as the Petitioner's actual jury. We disagree.

In responding to the State's argument concerning the strength of its case, we would first observe that it is questionable whether a harmless error analysis, based on the strength of the State's evidence, can ever be applied successfully to a constitutional error that can affect a jury's composition. Recent decisions of this Court have declined to excuse constitutional violations that occurred during jury selection as harmless error, because of the uncertainty of what would have happened but for the violation. See, *e.g.*, *Gray* v. *Mississippi*, ___ U.S. ___, ___, 107 S. Ct. 2045, 2055 (1987) ("The nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless"); *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986). In this regard, it bears noting that the Court's opinion in *Rose* v. *Clark*, 478 U.S. ___, 106 S. Ct. 3101 (1986), quoted extensively in the State's Brief at pages 55-59, cites no cases in which a constitutional error that affected a jury's composition was found to be harmless. Indeed, a composition-affecting constitutional error in jury selection is one in which "the wrong entity judged the defendant guilty", a type of error which the *Rose* v. *Clark* opinion specifically excluded from operation of the harmless error doctrine. 478 U.S. at ___, 106 S. Ct. at 3106.

Even if it is assumed that the harmless error doctrine can be applied to a constitutional error that affects a jury's composition, we submit that this doctrine cannot excuse the constitutional violation here, because the State's case was not as "damning" as it contends. Indeed, there was evidence from which a differently composed jury could have found in the Petitioner's favor on both guilt and sentencing issues.



The principal evidence offered against the Petitioner at trial was a confession obtained by police. The State's Brief fails to mention that this confession was obtained at 5:03 a.m., in the absence of counsel, after the Petitioner had spent a sleepless night in police custody (Tr. 761-62, 858, 896). Moreover, the State fails to mention that the Petitioner's IQ was 75 and that his schooling ended in the ninth grade (J.A. 26). Given these circumstances, there was a substantial basis for finding the confession involuntary—an issue that was submitted to the Petitioner's jury in accordance with Oklahoma law (R. 337). See *Cornell* v. *State*, 91 Okla. Crim. 175, 183-84, 217 P.2d 528, 532-33 (1950). A differently composed jury could have found the confession involuntary, disregarded it, and acquitted the Petitioner of all charges as a result.

The Petitioner was charged under a first degree murder statute, Okla. Stat., Tit. 21, § 701.7(A) (Supp. 1982), that required proof of a deliberate intent to take a human life; the Petitioner's jury was instructed as to this requirement (R. 334). In a portion of his confession not mentioned in the State's Brief, the Petitioner expressly stated that he did not intend to kill the decedent (Tr. 921). Thus, even if the confession were considered, a differently composed jury could have acquitted the Petitioner of first degree murder on the basis of this evidence.

The State's Brief also fails to mention the substantial mitigating evidence that was presented on the sentencing issue. In his confession, the Petitioner expressed remorse about the alleged crimes (Tr. 922). The trial judge found other mitigating evidence as well: that the Petitioner had been drinking before the homicide and that he had undergone a religious conversion while imprisoned and awaiting trial (Tr. 1069, 1073, 1074-84; J.A. 28-29). Although the State emphasizes that five aggravat-

ing circumstances were found by the jury, this finding did not compel the death penalty under Oklahoma law—it merely authorized the jury to consider that penalty. See *Parks* v. *State*, 651 P.2d 686, 694 (Okla. Crim. App. 1982). On the basis of the mitigating evidence presented at trial, a differently composed jury could have returned a life sentence, rather than the death penalty.

Since the error in this case was a constitutional one, it requires reversal unless this Court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In order to find the error in this case harmless, this Court must conclude beyond a reasonable doubt that a differently composed jury, made up of unknown individuals of unknown background and experience, would have reached the same verdicts as the Petitioner's actual jurors. Such a conclusion is impossible.

The evidence in this case was in conflict, and a differently composed jury could have resolved this conflict differently than did the Petitioner's actual jury. As Justice Jackson stated in his dissent in *Cassell* v. *Texas*, 339 U.S. 282, 301-02 (1950):

> The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. . . .

This Court cannot weigh the impact that use of a peremptory challenge could have had on the verdicts in the Petitioner's case. Accordingly, the unconstitutional deprivation of a peremptory challenge cannot be excused as harmless error.

**2. An Additional Peremptory Challenge Would Have Been Used to Alter the Composition of the Petitioner's Jury.**

The State does not dispute that the Petitioner would have had an additional peremptory challenge available if Mr. Huling had been removed by the trial judge. Nor does the State



dispute that, if such an additional peremptory challenge had been used, it could have altered the composition of the Petitioner's jury. Where the State and the Petitioner disagree is on the question of whether such an additional peremptory challenge would have been used, if it had been available. The Petitioner has contended that an additional strike, if available, would have been used, thereby altering the jury's composition. The State, on the other hand, has dismissed this argument as a "foray into the realm of the hypothetical" (Respondent's Brief at 54).

In condemning the Petitioner's resort to the "hypothetical," the State overlooks the fact that consideration of the "hypothetical" is essential to its argument that the error was harmless. If courts were unwilling to address the hypothetical question of what would have happened but for an error, no constitutional error would be regarded as harmless, and every such error would require reversal of a defendant's conviction. Without resort to the hypothetical, the harmless error doctrine would not exist.

Once a constitutional violation is established, it can be excused as harmless only if it is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). One way of establishing that the constitutional violation here was harmless would be by showing beyond a reasonable doubt that the Petitioner's jury would have had the same members, even if Mr. Huling had been removed for cause. This requires the State to show, beyond a reasonable doubt, that the additional peremptory challenge would not have been used. This burden is one which the State cannot meet.

Even though the Petitioner has no burden of proof on the harmless error issue, he has offered objective evidence showing that an additional peremptory strike would have been used: the Petitioner's counsel unsuccessfully requested additional peremptory strikes before trial (J.A. 4-5), exhausted his peremptory strikes at trial, and expressed dissatisfaction with the jury as finally impaneled (J.A. 25). The State has made no

effort to reconcile this evidence with its argument that an additional strike would not have been used. Instead, the State has simply ignored this evidence in its Brief.

In contending that an additional strike would not have been used, the State has focused on two aspects of the record. First, the State cites the fact that counsel "did not attempt to exclude another juror by peremptory challenge or ask for an additional peremptory challenge for that purpose." Second, the State relies on the fact that trial counsel failed to indicate for the record that he "wished to peremptorily strike another juror" (Respondent's Brief at 54). Neither ground is sufficient to establish, beyond a reasonable doubt, that an additional challenge would not have been used.

With regard to the failure to ask for or use a tenth peremptory challenge, the State overlooks the fact that its own law forbids granting more than the statutory number of peremptory challenges (in first degree murder cases, nine) to a criminal defendant. See *Prichard* v. *State*, 539 P.2d 392, 393-94 (Okla. Crim. App. 1975). Indeed, the State's own counsel insisted that this law be enforced against the Petitioner during pretrial proceedings in this case: "The statute says how many [peremptory challenges] and the Court [of Criminal Appeals] says the statute shall be obeyed" (J.A. 11-12). Since the Petitioner's counsel struck nine jurors (including Mr. Huling) by peremptory challenge, it would have been futile to have asked for a tenth peremptory strike—such a request had been denied once before by the trial court, at the State's urging (J.A. 12). Since such a request for another strike would have been futile and contrary to State law, the failure to make it does not establish, beyond a reasonable doubt, that an additional strike would not have been used. All that such a failure reveals is the recognition by the Petitioner's counsel that Oklahoma law would be enforced against the Petitioner.

With regard to counsel's failure to otherwise express a desire to strike another juror, *Gray* v. *Mississippi*, ___ U.S. ___, 107 S. Ct. 2045 (1987) makes clear that such a statement by



counsel, even if made, cannot be weighed in analyzing whether an error in jury selection was harmless. The error in this case was depriving the Petitioner of a strike during the sixth round of peremptory challenges. Under *Gray*, counsel's desire to use a peremptory challenge against another juror, even if expressed after the ninth round, would not have proven how the jury would have been composed in the absence of the sixth round error.

The State seeks to distinguish *Gray* on the ground that the jury selection error in *Gray* was removal of a juror, whereas the error in this case was failure to remove a juror (Respondent's Brief at 54-55). This Court ruled in *Gray* that statements by counsel, as to how jury selection would have proceeded had the court ruled differently on an earlier challenge for cause, are not to be weighed in analyzing whether or not an error was harmless. This conclusion does not depend on whether the challenge for cause was granted or denied. The logic of *Gray* applies with equal force when the jury selection error involves denying, rather than granting, a challenge for cause. Because counsel's desire to exercise another peremptory challenge would carry no weight under *Gray*, the failure to express such a desire for the record does not prove, beyond a reasonable doubt, that such a challenge would not have been exercised.

The State has failed to establish, beyond a reasonable doubt, that an additional peremptory challenge would not have been used to alter the membership of the Petitioner's jury. Indeed, the evidence gives every indication that counsel would have exercised such a challenge. The error in forcing the Petitioner to use a peremptory challenge on Mr. Huling was therefore not a harmless one.

### C. There Was No "Ambiguity" or "Confusion" in Mr. Huling's Expressed Intention to Sentence the Petitioner to Death Upon Conviction.

The State has argued, at pages 29-30 and 39 of its Brief, that Mr. Huling was merely "confused" in his responses to *voir dire*

questions, and that his responses were "ambiguous." In so contending, the State appears to be inviting the Court to find that Mr. Huling was an unbiased juror, and that the trial judge's refusal to exclude him therefore did not violate the Constitution. We disagree.

The State's argument of "ambiguity" and "confusion" is a new one, which it never raised in the Oklahoma courts. This argument competely ignores the findings of the Court of Criminal Appeals of Oklahoma:

> Upon the issue of failure to exclude a juror who would automatically vote for the death penalty, the facts show that one prospective juror stated twice that he would automatically vote for the death penalty if he found the defendant guilty of murder . . . . The failure of the trial court to remove a prospective juror who unequivocally states that he is unwilling to follow the law during the penalty phase by considering a life sentence is error.

(J.A. 36-37). The Oklahoma appellate court's finding of "the facts" thus included a finding that Mr. Huling's intention to sentence the Petitioner to death was "unequivocal."

This Court has ordinarily declined to review findings of fact made by lower courts. See, *e.g.*, *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925). Even if the Court were to depart from this practice and reexamine the facts found in this case, the record provides no basis for overturning the Oklahoma court's finding that Mr. Huling stated that he would "automatically vote for the death penalty" and that his statement was made "unequivocally".

Mr. Huling's responses to defense counsel's *voir dire* questions do not evidence confusion, nor are they ambiguous:

> Q. Just because you found him guilty you wouldn't necessarily give him the death penalty, would you?
>
> A. Yes.
>
> Q. Oh you would? If you found him guilty then in your own mind you would give him the death penalty?



> A. Yes.
>
> Q. You wouldn't consider anything else?
>
> A. No.

(J.A. 18). It is not surprising that Mr. Huling could have decided on a penalty before hearing any evidence: the homicide in question had been the subject of extensive pretrial publicity, and Mr. Huling had been exposed to this publicity (J.A. 15). The publicity about the homicide apparently permitted Mr. Huling to make up his mind about the appropriate penalty before the trial had begun.

Because Mr. Huling had decided upon a penalty before hearing evidence, he was not the "indifferent" juror required by the Sixth and Fourteenth Amendments. The State trial judge violated the Constitution when he refused to remove Mr. Huling from the Petitioner's jury, thereby forcing the Petitioner to use a peremptory challenge in order to do so.

## CONCLUSION

The judgment of the Court of Criminal Appeals of Oklahoma should be reversed.

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# AMICUS CURIAE

# BRIEF

(8)

Supreme Court, U.S.
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CLERK

No. 86-5309

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

---

BOBBY LYNN ROSS,

Petitioner,

v.

OKLAHOMA,

Respondent.

---

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

---

# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OKLAHOMA AS AMICI CURIAE

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No. 86-5309

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

BOBBY LYNN ROSS,
Petitioner,
v.
OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OKLAHOMA AS AMICI CURIAE

The American Civil Liberties Union and the ACLU of Oklahoma respectfully submit this amici curiae brief in support of the petitioner, Bobby Lynn Ross. The parties' consents to the submission of this brief are on file with the Clerk of the Court.

## INTEREST OF THE AMICI

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of more than 250,000 persons dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Oklahoma is its statewide affiliate.

Since its creation more than sixty years ago, the ACLU has been involved in the effort to ensure fair criminal procedures, including the right to be tried by an impartial jury. In furtherance of that goal, the ACLU participated as amicus curiae in this Court's



most recent decision on peremptory challenges. See Batson v. Kentucky, 106 S. Ct. 1712 (1986).

The ACLU has also participated in numerous capital cases before this Court, recognizing, as this Court has recognized, that imposition of the death penalty adds a special constitutional dimension to the general requirement of procedural fairness. This case implicates those values and therefore lies at the core of the ACLU's organizational interest.

## STATEMENT OF THE CASE[1/]

Petitioner Bobby Lynn Ross was brought to trial by the State of Oklahoma for capital murder. During voir dire, venire member Darrell Huling, in response to questions from defense counsel (J.A. 18),[2/] "stated twice that he would automatically vote for the

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1/ Amici adopt the Statement of the Case set forth in petitioner's brief. The Statement of the Case set forth here is meant only to highlight the important facts relevant to amici's argument.

2/ "J.A." refers to the Joint Appendix filed by petitioner and respondent. "Tr." refers to the trial transcript.



death penalty if he found the defendant guilty." Ross v. State, 717 P.2d 117, 120 (Okla. Crim. App. 1986). (J.A. 36)

Defense counsel immediately requested that Huling be stricken for cause. The trial court denied this request without explanation. (J.A. 19)

As a result of the trial court's ruling, petitioner was forced to use the sixth of his nine peremptory challenges to remove Huling from the panel. (J.A. 19; Tr. 392) Petitioner subsequently exhausted his remaining peremptory challenges. (J.A. 25) After trial, petitioner was convicted of

murder in the first degree and sentenced to death. (J.A. 33)

On appeal from the judgment and sentence, the Oklahoma Court of Criminal Appeals, citing this Court's decision in Stroud v. United States, 251 U.S. 15 (1919), reh'g denied, 251 U.S. 380 (1920), ruled that the trial court had erred in failing to excuse Huling for cause. (J.A. 36-37) Nevertheless, the court affirmed petitioner's conviction and sentence because "there [was] nothing in the record to show that any juror who sat on trial was objectionable." (J.A. 37) The appellate court rejected



petitioner's remaining assignments of error and, consequently, affirmed petitioner's judgment of conviction and sentence. (J.A. 46)

## SUMMARY OF ARGUMENT

The Oklahoma Court of Criminal Appeals wrongly assumed that the trial court's error in failing to excuse juror Huling for cause had been cured by petitioner's use of a peremptory challenge to remove Huling from the petit jury. The court then upheld petitioner's sentence in the absence of a showing that any of the remaining jurors was objectionable.

The holding of the court below rests on a fundamental misunderstanding of the peremptory challenge. The Court effectively held that the deprivation of



petitioner's peremptory challenge was of no consequence because there was no showing that any of the jurors who sat should have been excused for cause. But the peremptory challenge does not serve the same purpose as the challenge for cause. As this Court has recognized, the purpose of the peremptory challenge is to remove jurors perceived to be objectionable in circumstances in which the party cannot sustain a challenge for cause.

Furthermore, the court below ignored the crucial role of the peremptory challenge in securing the accused's constitutional

right to an impartial jury, effectively denying him that right as guaranteed by the Sixth and Fourteenth Amendments. Additionally, the court's ruling deprived petitioner of a substantive right guaranteed by state law -- the effective use of nine peremptory challenges -- in violation of the due process clause of the Fourteenth Amendment.

Finally, petitioner's loss of his peremptory challenge cannot be dismissed as harmless error. This Court's decisions have consistently recognized that the "nature of the jury selection process" in capital cases does not



lend itself to harmless error analysis. Gray v. Mississippi, 107 S. Ct. 2045, 2055 (1987). Therefore, petitioner's sentence should be vacated.

## ARGUMENT

## I.

## THE RULING BELOW IMPROPERLY IMPAIRED THE FULL AND FAIR EXERCISE OF PETITIONER'S JURY CHALLENGES AND THEREBY ABRIDGED HIS RIGHT TO SECURE AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

### A. Petitioner Was Denied The Effective Use of His Jury Challenges

Defendants in criminal cases have two important tools with which to safeguard their constitutional right to trial by an impartial jury: the challenge for cause and the peremptory challenge. Gray v. Mississippi, 107 S. Ct. 2045, 2048 n.3 (1987); see J. Van Dyke, Jury Selection Procedures 139-75 (1977). Petitioner was effectively



denied use of both of those tools by the ruling below.[3/]

In a capital case, the defendant is entitled to a challenge for cause to exclude jurors, such as Huling, whose beliefs preclude them from faithfully applying the law to determine whether a defendant lives or dies. See Wainwright v. Witt, 469 U.S. 412, 423-26 (1985); Patton v. Yount, 467 U.S. 1025, 1036

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3/ The right to trial by an impartial jury is guaranteed by the Sixth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145 (1968); Irvin v. Dowd, 366 U.S. 717 (1961).

(1984); (J.A. 36). The number of jurors who may be removed for cause is limited only by the ability to demonstrate juror bias. And it is well established that the failure to remove a juror who will "render no other verdict than one which required capital punishment" is error. Stroud v. United States, 251 U.S. 380, 381 (1920), denying reh'g to 251 U.S. 15 (1919); (J.A. 36-37).

However, no state relies solely on challenges for cause to secure fair juries; every state provides a limited number of peremptory challenges to ensure impartiality. See J. Van Dyke,



supra, 282-84 (listing number of peremptories available in each state). The critical significance of the peremptory challenge to the criminal defendant's right to a fair jury has long been recognized by this Court:

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury . . . . Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the states] to grant peremptory challenges," . . . nonetheless the challenge is "one of the most important of the rights secured to the accused . . . ." The denial or impairment of the right is reversible error without a showing of prejudice . . . . "For it is, as Blackstone

> says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."

Swain v. Alabama, 380 U.S. 202, 219 (1965) (citations omitted; emphasis added), overruled in part on other grounds, Batson v. Kentucky, 106 S. Ct. 1712 (1986).[4/] Here, the record is undeniable that petitioner was prevented from exercising "with full freedom" his right to exclude biased jurors peremptorily. (J.A. 19; Tr. 392)

Peremptory challenges are not merely a matter of tactical advantage. As described by Blackstone, they are the primary means by which a capital defendant may remove biased venire members for inarticulable, but nonetheless

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4/ Batson v. Kentucky established a discrete limitation on the exercise of peremptory challenges; it held that the equal protection clause of the Fourteenth Amendment forbids the prosecution from peremptorily challenging jurors solely on account of their race. 106 S. Ct. at 1718-19. Batson does not address the exercise of peremptory challenges by defense counsel, id. at 1718 (Continued)



(Continued)
n.12, nor does it address this petitioner's claim that he has been denied an impartial jury as ensured by the Sixth and Fourteenth Amendments. Id. at 1716 n.4.

significant, reasons. IV W. Blackstone, Commentaries 353 (15th ed. 1809).[5/]

The Oklahoma appellate court, by denying relief on the

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5/ Petitioner's case illustrates the potential for harm when the right to remove jurors for inarticulable reasons is abridged. Petitioner, a black man, may have perceived racial bias in any number of jurors -- particularly since "there were no black people called as jurymen" (J.A. 25) -- but been unable to express an objection sufficient to sustain a challenge for cause. See J. Van Dyke, supra, at 168 (challenge for cause is insufficient by itself to remove racially-biased jurors because jurors will rarely admit to harboring socially unacceptable prejudices).



ground that there was no showing that an objectionable juror eventually sat, confused peremptory challenges with challenges for cause. In fact, the two are distinct tools that must be used in tandem in order to achieve an impartial jury. The challenge for cause is limited solely by the defendant's ability to articulate bias, whereas the peremptory challenge enables the defendant to remove a limited number of jurors without articulating the basis of his perception that the juror is prejudiced against him. Gray v. Mississippi, 107 S. Ct. at 2048 n.3.

The illogic of the Oklahoma appellate court's decision is that it requires petitioner to explain why he would have otherwise exercised the peremptory challenge wrongfully taken from him. In short, the ruling necessitates that petitioner sustain a post-trial challenge for cause in order to demonstrate the harm caused by the deprivation of his peremptory challenge. In doing so, it fundamentally misconceives and distorts the purpose behind the peremptory challenge.



B. The Denial of Petitioner's Effective Use of His Jury Challenges Violated His Constitutional Right To Secure An Impartial Jury

"For cause" and peremptory challenges represent the historic means, guaranteed by every state, including Oklahoma,[6/] for assuring each defendant the constitutional right to be tried before an impartial jury. The means and end are inextricably tied. Thus, this Court has consistently recognized that the right to an impartial jury can be

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6/ See Okla. Stat. Ann. tit. 22, §§ 621-693 (1969 & West Supp. 1987).

preserved only by safeguarding the integrity of jury selection procedures. See Gray v. Mississippi, 107 S. Ct. 2045 (1987); Lockhart v. McCree, 106 S. Ct. 1758 (1986); Turner v. Murray, 106 S. Ct. 1683 (1986).

As acknowledged by the Oklahoma Court of Criminal Appeals, petitioner's right to challenge Huling for cause was violated when the trial court refused to remove the clearly unfit juror. (J.A. 36-37). And, as demonstrated above, petitioner's right to the full and free exercise of his peremptory challenges was impaired when he was forced to exercise one



of those challenges to exclude Huling. The court below ruled, however, that the sentence should be affirmed because there had been no showing that the final jury was objectionable.

The lower court's reasoning is flawed in two ways. First, as noted above, the decision is inherently illogical in that it requires petitioner to articulate the basis of a peremptory challenge -- the very purpose of which is to allow the defendant to remove a juror without expressing his objection. Second, the lower court failed to realize that jury impartiality has never been evaluated

solely by the composition of the final panel. This Court recently observed that where, as here, procedural errors have occurred in the jury selection process, the proper inquiry is "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error." Gray v. Mississippi, 107 S. Ct. 2045, 2055 (1987) (emphasis in original). "[I]t is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints." Lockhart v. McCree, 106 S. Ct. 1758, 1770 (1986).



The underpinning of Gray and Lockhart is that any attempt to define an impartial jury solely through a post-hoc analysis of jurors is impossible in all but the most egregious cases. Yet, that was precisely the strategy of the court below when it affirmed the judgment, despite basic constitutional defects in the jury selection process, on the ground that petitioner had failed to demonstrate that the final panel was "objectionable" according to some standard that the Oklahoma courts never even bothered to define.

Moreover, the Oklahoma courts failed to appreciate the particular importance of jury selection procedures in capital cases. The "basic requirements of procedural fairness" demand that "the decision whether a man deserves to live or die must be made on scales not deliberately tipped toward death." Witherspoon v. Illinois, 391 U.S. 510, 521 (1967). Accord, Gray v. Mississippi, 107 S. Ct. at 2053 (rejecting argument that erroneous exclusion for cause in capital case is not prejudicial if ultimate jury panel fairly represents the community).



Thus, this Court recently vacated a death sentence solely because, "[b]y refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury." Turner v. Murray, 106 S. Ct. 1683, 1688 (1986). In doing so, the Court noted that the "risk of racial prejudice infecting a capital sentencing procedure is especially serious in light of the complete finality of the death sentence." Id. Turner did not attempt to determine whether the individual jurors were objectionable.

Here, petitioner's right to an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments, was irreparably impaired at the jury selection stage. The lower court erred by failing to recognize that constitutional impairment. Its error should not go unremedied in this capital case.

## II.

## PETITIONER WAS DEPRIVED OF HIS STATE ENTITLEMENT TO PEREMPTORY CHALLENGES, IN VIOLATION OF THE FOURTEENTH AMENDMENT

The impairment of petitioner's effective use of his peremptory challenge -- in addition to encroaching on his Sixth



Amendment right to an impartial jury -- extinguished an entitlement guaranteed him by state law, in violation of the due process clause of the Fourteenth Amendment.

The Oklahoma legislature has provided both the prosecution and the defendant with nine peremptory challenges in first degree murder cases. Okla. Stat. Ann. tit. 22, § 655 (West Supp. 1987). By improperly forcing petitioner to use one of those challenges on Huling, the trial court effectively left petitioner with fewer peremptories than the prosecution, a situation contravening the law in Oklahoma as well as every other

state.[7] The impact of that deprivation is all the more evident from the fact that petitioner ultimately exhausted all his peremptory challenges.

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7/ Although numerous states provide a capital defendant with more peremptory challenges than the prosecution, no state provides the defendant with fewer challenges than the prosecution. See J. Van Dyke, supra, 282-84 (1977). Indeed, historically, the peremptory challenge has not always been available to the prosecution. See IV W. Blackstone, supra, 353 ("[t]his privilege; of peremptory challenges, though granted to the prisoner, is denied to the king by . . . statute").



On that ground, this case is analogous to Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), in which this Court condemned the state's abrogation of a substantive right the state itself had created. In Logan, a scheduling error deprived the petitioner of his state-created right to adjudicate an employment discrimination claim. This Court held that, although the state was not initially required to provide a forum for petitioner's grievance, once it had done so, it created "an individual entitlement grounded in state law" that the state could not arbitrarily

extinguish without violating due process. Id. at 430.

Here, Oklahoma chose to provide nine peremptories to defendants in capital cases. As in Logan, the due process clause precludes the arbitrary deprivation or restriction of that state-created right. Yet petitioner in this case effectively had one peremptory challenge less than state law provides as a result of the trial court's ruling. See Harrison v. United States, 163 U.S. 140, 141-42 (1896) (denial of full number of peremptory challenges is reversible error).



The present case is also analogous to Hicks v. Oklahoma, 447 U.S. 343 (1980), where this Court reversed the Oklahoma Court of Criminal Appeals' holding that the defendant had not been harmed by the denial of his state-created right to be sentenced within the jury's discretion. In doing so, this Court rejected the argument that Hicks had merely been denied "a procedural right of exclusively state concern." Id. at 346. Rather, this Court ruled, the defendant had a state-created liberty interest that could not be arbitrarily eliminated under the Fourteenth Amendment. Id.

(citations omitted); see Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) (due process gives capital defendant "a legitimate interest in the character of the procedure which leads to the imposition of sentence").

Hicks v. Oklahoma also rejected an argument based "on the frail conjecture" that the denial of the defendant's state entitlement might not have altered the trial outcome, and therefore was of no consequence. 447 U.S. at 346. Nevertheless, in the instant case, the Oklahoma Court of Criminal Appeals again rested on



the "frail conjecture" that petitioner was not prejudiced because the record failed to show that, despite the loss of a peremptory challenge, the ultimate jury panel was "objectionable." As demonstrated below, such a "harmless error" analysis has no place in this case.

III.

THE TRIAL COURT'S INTERFERENCE WITH PETITIONER'S RIGHT TO AN IMPARTIAL JURY CANNOT BE HARMLESS ERROR

This Court observed in Swain v. Alabama, 380 U.S. 202, 219 (1965), that the "denial or impairment of the right [to peremptory challenges] is reversible error

without a showing of prejudice." The Court's recent ruling in Batson v. Kentucky, 106 S. Ct. 1712 (1986), does not disturb that conclusion. The Oklahoma Court of Criminal Appeals, however, operated on an opposite assumption, and required petitioner to demonstrate that prejudice resulted from the impairment of his peremptory challenge.

As this Court noted only last Term, in another capital case involving jury selection procedures, constitutional errors can never be regarded as harmless if the nature of the violation defies any effort to establish



harm. Gray v. Mississippi, 107 S. Ct. at 2054-56. Thus, Gray held that a death sentence must be vacated, without a showing of harm, where a juror who was qualified to sit was erroneously struck for cause. Id. at 2052 (citing Davis v. Georgia, 429 U.S. 122 (1976) (per curiam)). The Gray analysis applies with full force here.

At the time the trial court wrongly denied the motion to remove Huling for cause, four of petitioner's nine peremptory challenges remained. "Due to the nature of trial counsel's on-the-spot decisionmaking during jury selection, the number of peremptory

challenges remaining for counsel's use clearly affects his exercise of those challenges." Gray, 107 S. Ct. at 2055. The question of whether petitioner was able to articulate an objection on appeal to any of the remaining jurors is, therefore, irrelevant. Because of the way in which jury selection proceeded, it is impossible to know with any degree of certainty how petitioner would have exercised the peremptory used on Huling, and how the sacrifice of his sixth peremptory affected the exercise of his remaining challenges.

This Court acknowledged as much in Gray, stating: "[t]he



nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless." Id. Here, too, the fact that jury challenges are based largely on intangible perceptions and "on-the-spot decision-making" renders it impossible to establish with the requisite constitutional clarity that the trial court's errors in this case were harmless.

The burden of proof clearly lies with the state to establish harmlessness. Chapman v. California, 386 U.S. 18 (1967), unequivocally "casts on someone

other than the person prejudiced by [constitutional error] a burden to show that it was harmless." Id. at 24. By insisting that petitioner identify an "objectionable" juror as a condition of reversal, the ruling below improperly cast the burden of proof on petitioner and on this ground as well cannot be sustained.[8/]

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8/ Moreover, the present case falls within the exception to the harmless error rule. As stated in Chapman, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Id. at 23 n.8; see Gray, 107 S. Ct. at 2056-57 (opinion of

(Continued)



As in Gray, the mechanism

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(Continued)

Blackmun, J.). The peremptory challenge is such a right. Swain v. Alabama, 380 U.S. at 219. See also Note, Deadly Mistakes: Harmless Error In Capital Sentencing, 54 U. Chi. L. Rev. 740, 748-58 (1987) (procedures and policies unique to capital punishment render it impossible to determine that an error could not have affected sentencing deliberations).

Furthermore, the Fourteenth Amendment does not require a criminal defendant to show "actual bias in the tribunal . . . [;] due process is denied by circumstances that create the likelihood or appearance of bias." Peters v. Kiff, 407 U.S. 493, 502 (1972) (opinion of Marshall, J.). See In re Murchison, 349 U.S. 133, 136 (1955) ("Fairness of course requires

(Continued)

for selecting petitioner's capital sentencing jury was improperly skewed, to his detriment. In the first instance, petitioner was denied the opportunity to remove for cause a clearly unfit juror. That error was compounded, not cured, by petitioner's compelled decision to sacrifice a peremptory challenge to remove Huling. As

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(Continued)

> an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."); see also Taylor v. Louisiana, 419 U.S. 522, 532 & n.12 (1975); Turner v. Louisiana, 379 U.S. 466 (1965); Tumey v. Ohio, 273 U.S. 510 (1927).



demonstrated in Point I, the effective reduction in the number of petitioner's peremptories itself severely prejudiced petitioner's right to secure an impartial jury as guaranteed by the Sixth and Fourteenth Amendments.

This Court aptly noted, in Gray, that "'two wrongs do not make a right.' Although we prefer that a trial court remedy its own mistakes if possible, we cannot condone the 'correction' of one error by the commitment of another." 107 S. Ct. at 2054. The teaching of Gray applies here and compels the reversal of petitioner's sentence.

## Conclusion

For the foregoing reasons, the decision of the Oklahoma Court of Criminal Appeals affirming petitioner's sentence should be reversed.

Dated: August 24, 1987

Respectfully submitted,

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